EL Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar tanto como es posible las relaciones de ambos países, y de servir á sus comunes intereses, por medio de un Tratado de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este objeto, dando el Presidente de Nicaragua sus amplios poderes al señor Licenciado don Vicente Navas, Enviado Extraordinario y Ministro Plenipotenciario ante el Gobierno costarricense, y el Presidente de Costa Rica, al señor Doctor don José María Castro, Secretario de Estado en el Despacho de Relaciones Exteriores de la República, quienes después de haber presentado sus Plenos Poderes, de haberlos canjeado y encontrado con toda la regularidad debida, han convenido en los artículos siguientes :

Artículo I.

Habrá perfecta paz, perpetua y sincera amistad entre las Repúblicas de Nicaragua y Costa Rica.

Artículo II.

En ningún caso Nicaragua y Costa Rica se harán la guerra. Si entre ellas llegare á surgir alguna diferencia, se darán las debidas explicaciones; y no pudiendo avenirse en el asunto ocurrido, adoptarán precisa é ineludiblemente para terminarlo, el medio humanitario y civilizado del arbitraje.

Artículo III.

La designación del árbitro, se hará en un convenio espetes, lo cual es casi imposible, desde luego que al deber y buen nombre de ellas cumple guardar lo estipulado en los artículos precedentes.

Artículo V.

Si por desgracia, alguna Nación hiciere la guerra á Nicaragua ó á Costa Rica, las partes contratantes convienen en no hacer alianza ofensiva, ni prestar ninguna clase de auxilios á los enemigos de ninguna de las dos Repúblicas; pero esto no obsta á que puedan celebrar alianza para la defensa de sus derechos, ó la de sus respectivos territorios en caso de ser invadidos.

Artículo VI.

Si el desacuerdo ó desavenencia ocurriere entre otros Estados de Centro América, las partes contratantes, de común acuerdo, ó cada una por sí, ofrecerán á aquellos sus buenos oficios, y mediarán á fin de mantener la armonía general en Centro América.

Artículo VII.

Si se suscitare cuestión entre uno de los Gobiernos contratantes y alguna Potencia extranjera, el otro ofrecerá sus buenos oficios, excitando á la vez á los demás Gobiernos de Centro América á que por su parte hagan lo mismo, hasta lograr un arreglo equitativo y satisfactorio. Este compromiso deberá cumplirse desde que se tenga conocimiento de la cuestión y los correspondientes informes de su naturaleza y circunstancias.

Artículo VIII.

Debiendo las Repúblicas contratantes considerarse recíprocamente como hermanas, se declara y establece que, en cuanto lo permitan las Constituciones que ahora las rigen, y lo más, pero no lo menos, que franqueen las venideras, los nicaragüenses en Costa Rica y los costarricenses en Nicaragua, gozarán de los mismos derechos políticos que incumben á los naturales. En consecuencia, para que sea eficaz este propósito, el Gobierno de Costa Rica se compromete á procurar la reforma de su Constitución vigente en el sentido de que se conceda á los nicaragüenses y demás centroamericanos el goce completo de los derechos políticos, pues por lo que hace á Nicaragua, no presentando inconvenientes su Constitución actual, quedan desde ahora otorgados á los costarricenses. En cuanto á los derechos civiles, dicho goce y equiparación serán desde luego absolutos, sin reserva ni diferencia alguna, especialmente en cuanto á libertades y seguridades personales y de domicilio; á los medios de adquirir bienes de toda clase; poseerlos, conservarlos, trasferirlos y trasportarlos dentro y fuera de la República y al libre ejercicio del comercio y la navegación: todo sin otras limitaciones, formalidades é impuestos nacionales ó municipales, que aquellos á que están ó llegaren á estar sujetos los naturales.

Artículo IX.

El ejercicio de derechos políticos, y la admisión y servicio de cualquier empleo ó cargo público por parte de los ciudadanos de una República en la otra, nunca y en ningún caso podrán afectar la nacionalidad ni la ciudadanía de su origen; mas, en la República donde tales derechos y empleos ó cargos ejerzan, están sujetos á todas las cargas y servicios obligatorios á los naturales.

Artículo X.

Los costarricenses en Nicaragua y los nicaragüenses en Costa Rica, podrán ejercer con arreglo á las leyes del país en que residan sus profesiones ú oficios, sin más requisitos que la presentación del título, debidamente autenticado, la justificación de la identidad de la persona, si fuere necesaria, y el pase correspondiente del Gobierno Supremo. También tendrán el derecho de incorporar en la Universidad ó Colegio respectivo, sus cursos académicos, previa la autenticación é identidad referidas.

Artículo XI.

Los documentos, títulos académicos, diplomas profesionales y escrituras públicas, de cualquiera naturaleza que sean, extendidos ú otorgados conforme á las leyes de la una ó de la otra República, respectivamente, valdrán en aquella donde se presenten para que tengan sus efectos, y se les dará entera fe si contuvieren los requisitos necesarios de autenticidad. Los Tribunales evacuarán los exhortos y demás diligencias judiciales, habiendo para ello solicitud de autoridad legítima, enviada en forma, y un encargado de la parte interesada para proveer lo que el caso demande.

clamos para entablar una acción diplomática, ni ejercer ésta, si no es en el caso de que hayan agotado en la respectiva demanda, todos los recursos que para ante autoridades del país las leyes del mismo franqueen á los naturales.

Artículo XVI.

En cuanto á los daños ó perjuicios que el nacional de una de las Repúblicas contrayentes recibiere en el territorio de la otra, el Gobierno de ésta no será responsable, si no es que sean causados por Agentes del mismo Gobierno ó Autoridad del país, en cuyo caso, los perjudicados deben ser atendidos por las autoridades de la República donde lo han sido, y obtener de ellas la debida justicia, bajo las mismas leyes á que están sujetos los nacionales, de tal suerte que los naturales de una de las partes contratantes, en ningún caso serán de menor condición que los de la otra.

Artículo XVII.

Ambas Repúblicas se comprometen á fijar las bases para establecer y mantener una representación común en el exterior, para procurar una legislación uniforme, y para constituir un sistema común de pesas, medidas y monedas, sobre la base decimal, todo en el más corto plazo posible.

Artículo XVIII.

Cuando la Constitución de Costa Rica abra el campo que la de Nicaragua, y la oportunidad se presente, de celebrar concierto para la Unión Centroamericana, los Gobiernos contratantes se empeñarán de consuno en la realización de esa grande idea. Cualquiera de los dos que la intente ó que sea invitado para ella, deberá dar al otro noticia inmediata y completa de las negociaciones que ocurran, desde el momento en que se inicien y á medida que se vayan verificando.

Artículo XIX.

No pudiendo considerarse rigurosamente las Repúblicas de Nicaragua y Costa Rica como Naciones extranjeras, por razón de su común origen, por las conexiones ó intereses te-

rritoriales, comerciales y políticos que las han ligado y las ligan, se declara y establece, respecto de sus particulares y propias producciones: que las importaciones y exportaciones que se hagan de uno á otro punto, ya sean por mar ó por tierra, de los artículos ó productos naturales ó industriales propios del país que los remite, no pagarán derechos ni impuestos de ninguna clase, sean fiscales ó locales.

Para evitar toda duda, lo mismo que cualquier fraude, se conviene en que los productos de que habla este artículo, en su introducción al territorio ó dominios de la una parte, deberán ir acompañados de una guía expedida por las autoridades competentes de la otra, en que se hará constar ser de ella el origen ó procedencia de dichos productos: esto por lo que hace á la importación; mas, respecto de la exportación, el que la verifique tiene la obligación de presentar dentro de dos meses la correspondiente tornaguía, si esto se le exigiere.

Artículo XX.

Las Repúblicas contratantes se entregarán recíprocamente los individuos prófugos de la una, refugiados en la otra, que estuvieren procesados ó sentenciados, como autores, cómplices ó encubridores, por los delitos de homicidio, incendio, robo, abigeato, piratería, peculado, falsificación de moneda, sellos ó instrumentos públicos, bonos y documentos de crédito del Estado, billetes de Banco, ó cualquiera otro valor público, defraudación de las rentas públicas, quiebra fraudulenta, falso testimonio, y por cualquiera otro delito que tenga señalada pena de muerte, penitenciaría, presidio, trabajos forzados ó prisión, que no baje de dos años en la Nación en que se hubiesen cometido, aunque la pena sea menor ó distinta en la del refugio.

Artículo XXI.

La pena de dos años de prisión, mencionada en el artículo anterior, señala solamente la naturaleza de los delitos que motivan la extradición, cuando ésta se pide durante el enjuiciamiento; pero no limita los efectos del juicio, si por circunstancias atenuantes ú otros esclarecimientos favorables al reo, fuese éste sentenciado á sufrir pena menor.

Artículo XXII.

Para los efectos de la extradición, se comprenden en la postal, dirigida al Ministro de Relaciones Exteriores, directamente ó por medio del respectivo Agente Diplomático. El arresto provisional se verificará en la forma y según las reglas establecidas por la legislación del país del asilo; pero cesará, si en el término de un mes, contado desde que se verificó, no se formalizase la reclamación indicada en el artículo precedente.

Artículo XXVIII.

Si el reo fuere ciudadano del país en que se ha refugiado y se solicitare su extradición para que sufra la pena impuesta por sentencia ejecutoriada, emitida con su audiencia, se entregará con sujeción á lo dispuesto en los artículos XXIII, XXIV y XXV; pero si la extradición se pidiese por causa de enjuiciamiento, el Gobierno no está obligado á concederla, si el reo prefiriere ser juzgado por los Tribunales de su país; en este caso, con los antecedentes recogidos en el punto donde se hubiese cometido el delito, y después de evacuarse los exhortos que se creyeren convenientes, el Juez del domicilio del reo, ó el de la capital, si no lo hubiere, deberá seguir el proceso hasta terminarlo; y el Gobierno del país del juzgamiento informará al otro Gobierno del resultado definitivo.

Artículo XXIX.

Cuando haya lugar á la extradición, todos los objetos aprehendidos, que tengan relación con el delito y sus autores, se entregarán sin perjuicio del derecho de tercero, á la República reclamante. Dicha entrega se verificará aunque por la muerte ó fuga del inculpado, no pueda llevarse á efecto la extradición.

Artículo XXX.

No será concedida la extradición, si el reo reclamado hubiese sido ya juzgado y sentenciado por el mismo hecho en la República donde reside, ó si conforme á las leyes de la República que la solicita, hubiesen prescrito la acción ó la pena.

Artículo XXXI.

Si el reo, cuya extradición se solicita, estuviese acusado ó hubiese sido condenado por crimen ó delito cometido en la jurisdicción territorial de la República en que se encuentra, no será entregado sino después de haber sido absuelto ó indultado, y, en caso decondenación, después de haber sufrido la pena.

En los casos en que el reo, cuya entrega se pida, hubiese contraído obligaciones que no pueda cumplir á causa de la extradición. ésta se llevará siempre á efecto, quedando la parte interesada en libertad de gestionar sus derechos ante la autoridad correspondiente.

Artículo XXXII.

Cuando el acusado ó condenado, cuya extradición se solicite por una de las partes contratantes, fuere igualmente reclamado por otro ú otros Gobiernos, á causa de crímenes ó delitos cometidos en jurisdicción de ellos, por el mismo culpable, éste será entregado de preferencia al Gobierno que primero hubiese hecho la demanda de extradición.

Artículo XXXIII.

Los gastos que causen el mantenimiento y trasporte del individuo reclamado, y también la entrega y traslación de los objetos, que por tener relación con el delito deban restituirse y remitirse, serán á cargo de la República que solicite la entrega.

Artículo XXXIV.

Si además de los exhortos para la deposición de testigos domiciliados en el territorio del otro Estado, la autoridad del país del exhorto, conceptuase necesario el comparendo de dichos testigos ó de otros á quienes no se hubiese referido el exhorto, el Gobierno de quien dependen unos y otros testigos procurará corresponder á la invitación que le haga el otro Gobierno solicitando el comparendo. Si los testigos consintiesen en ir, los Gobiernos respectivos se pondrán de acuerdo para fijar la indemnización debida, que se les abonará por el Estado reclamante, en razón de la distancia y de la permanencia, anticipándoles la suma que necesiten. Igual convenio celebrarán las partes contratantes, para proporcionarse recíprocamente, siempre que sea posible, los demás medios de prueba correspondientes á la instrucción criminal en el respectivo país.

Annex 23

UNITED STATES OF AMERICA-NICARAGUA, TREATY PROVIDING FOR THE CONSTRUCTION OF AN INTEROCEANIC CANAL ACROSS THE TERRITORY OF NICARAGUA (FRELINGHUYSEN-ZAVALA), WASHINGTON, D.C., PREAMBLE, ARTICLES IV, V, VII AND XIII, 1 DECEMBER 1884

SOURCES: ENGLISH VERSION: *REPORT OF THE ISTHMIAN CANAL COMMISSION 1899-1901* (WASHINGTON: GOVERNMENT PRINTING OFFICE, 1904), APPENDIX L, PP. 359-361. SPANISH VERSION: *MEMORIA DE LA SECRETARÍA DE RELACIONES EXTERIORES Y CARTERAS ANEXAS DE LA REPÚBLICA DE COSTA RICA* (SAN JOSÉ: IMPRENTA NACIONAL, 1884-1885)

58th Congress, 2d Session. } SENATE. { Document No. 222.

REPORT

OF THE

ISTHMIAN CANAL COMMISSION,

1899-1901.

REAR-ADMIRAL JOHN G. WALKER,
United States Navy,
President.

HON. SAMUEL PASCO.
MR. GEORGE S. MORISON.
LIEUT. COL. OSWALD H. ERNST,
Corps of Engineers, U. S. Army.
LEWIS M. HAUPT, C. E.

ALFRED NOBLE, C. E.
COL. PETER C. HAINS,
Corps of Engineers, U. S. Army.
WILLIAM H. BURR, C. E.
PROF. EMORY R. JOHNSON.

LIEUT. COMMANDER SIDNEY A. STAUNTON,
United States Navy,
Secretary.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1904.

APPENDIX L.

TREATY NEGOTIATED BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF NICARAGUA PROVIDING FOR THE CONSTRUCTION OF AN INTEROCEANIC CANAL ACROSS THE TERRITORY OF NICARAGUA.

[Frelinghuysen—Zavala.]

The United States of America and the Republic of Nicaragua recognizing the importance of an interoceanic communication across the isthmus at Nicaragua, which shall bring into close communication the ports of North and South America, and shall facilitate commerce between Europe and the ports of the Pacific, between the eastern ports of Asia and the Atlantic seaboard, and the ports of the United States on the Pacific and Atlantic, have agreed for this purpose to build a canal, and to that end to conclude a treaty, and have accordingly named as their respective plenipotentiaries the President of the United States, Frederick T. Frelinghuysen, Secretary of State of the United States of America, and the President of Nicaragua, General Joaquin Zavala, ex-President of the Republic of Nicaragua, who, after communicating to each other their full powers, found in due and proper form, have agreed upon the following articles:

ARTICLE I. The canal shall be built by the United States of America and owned by them and the Republic of Nicaragua, and managed as hereinafter provided.

ARTICLE II. There shall be perpetual alliance between the United States of America and the Republic of Nicaragua, and the former agree to protect the integrity of the territory of the latter.

ARTICLE III. A practicable ship canal for vessels of the largest size now commonly used in commerce shall be commenced by the United States and be prosecuted to as speedy conclusion as circumstances may permit, subject to the limitation provided in Article XX of this convention.

This canal shall follow what may be decided to be the most available route from ocean to ocean; and the United States in building the canal shall enjoy the fullest liberty in its construction, and in its location, and that of its dependencies, accessories, and works, as well as in the selection of entrance ports.

Should it be found necessary or desirable to leave the bed of the San Juan River at any point and to construct a lateral canal the Government of Nicaragua reserves the right to require the establishment of a lock communication for vessels of 6 feet draft and 160 feet length, between the lower part of the river and that part used for the canal; but the Government of Nicaragua will advise the United States of its wishes in this regard so soon as work shall be begun in the river, and it is expressly stipulated that Nicaragua alone shall be responsible for the maintenance and operation of this communication, and for the navigable condition of the lower river.

ARTICLE IV. For the purpose of carrying out this agreement the Republic of Nicaragua agrees to give the United States free use of Lake Nicaragua, to furnish, free of cost, all the spaces necessary to the construction, maintenance, use, and enjoyment of the canal, and for any probable future enlargement thereof, whether these spaces be upon the dry land, in the lakes and upon their islands, in the rivers and upon their islands, or at the ports and roadsteads of the two oceans, together with their surroundings and declivities, and all the spaces required for the deposit of materials from excavations and cuttings, from the overflow arising from dams in the rivers, for all deviations of streams from their channels, as well as for reservoirs, dykes, piers, docks, spaces about locks, for lights, beacons, storehouses, machine shops, buildings, and for whatever other thing necessary, and in short, all lands, waters, and places within the Republic of Nicaragua required for the construction, maintenance, use, and business of the canal, including a railway, from one terminus of the canal to the other, substantially parallel to and near the bank of the canal and along the southern shore of Lake Nicaragua, together with a telegraph line, should the United States decide to construct either said railway or telegraph line, or both, which shall be regarded for all purposes of this treaty as part of the canal so long as they are maintained.

ARTICLE V. The work shall be declared one of public utility, and for the purposes of building and operating the canal, railway, and telegraph line, the Republic of Nicaragua undertakes to expropriate lands belonging to individuals. Any private property and real estate actually held by individuals or corporations which shall be taken or used by the United States for the construction of the canal or its accessories, or for their maintenance, shall be so taken upon condemnation and appraisement of the value of such property, and the Government of the United States will pay to the owners thereof the value fixed by a commission of assessors comprising three members, one of whom shall be appointed by the President of the United States, one by the President of Nicaragua, and the third to be chosen by these two jointly.

The United States or the board of managers hereafter provided for, as the case may be, shall have the right to take from the public lands of Nicaragua any materials whatever needed for the construction, preservation, maintenance, and use of the canal, and of its ports, dependencies, accessories, and equipments. When materials are taken from private lands, the United States or the said board of managers shall enjoy in their use all the rights the Republic of Nicaragua enjoys by law and usage.

As to the contract of the Government of Nicaragua with Mr. F. A. Pellas, relating to steam navigation, that Government engages that the said contract shall not be considered applicable to the necessary operations of either party to this convention in constructing or operating the canal, or any part of it, during the time the contract has yet to run, this exemption to include necessary canal work and transportation on Lake Nicaragua and the rivers of the Republic; further, the said Government of Nicaragua agrees that should the Government of the United States during the period the said contract has yet to run find it advisable to purchase the franchise, property, and rights now held by said Pellas by virtue of said contract, the said franchise, property, and rights shall be expropriated by the same form and under the same conditions as are fixed in this article for the expropriation of other private property.

Should the United States in the construction of the said works find it necessary to occupy any lands belonging to the Republic, they shall have the right to do so free of charge during such temporary occupation, and the land so occupied, if sold or otherwise alienated, shall be conveyed with the reservation of this temporary right of occupation by the United States.

ARTICLE VI. The United States shall have the right throughout the extent of the canal, and of its accessories, dependencies, and adjuncts, as well as at its mouths on both oceans, and in the lake and rivers which the canal route may traverse, and that may be used in any manner in connection with the canal construction, to enter upon work of any kind whatsoever deemed necessary by the engineers for the construction of a safe, effective, durable, and speedy route for the transit of vessels from ocean to ocean, without let or hindrance of any kind from the Government or people of the Republic of Nicaragua; and also for the construction of the said railway and telegraph line.

ARTICLE VII. A strip of territory 2½ English miles in width, the middle of this strip to coincide with the center line of the canal, and also a strip 2½ miles wide around the southern end of the lake, where the lake is used as a water course for the canal, as well as a strip 2½ miles wide along the river, where the river is used as a part of the canal, shall be set aside for the work, and owned by the two contracting parties, and where the railway and telegraph line aforesaid may of necessity pass beyond the bounds of such strip of land a plot one-half of a mile in width, whose center line shall coincide with the railway outside of the belt reserved for the canal, shall also be so set aside and owned. And all the land in this article referred to shall be subject to the agreement hereinbefore made as to lands, when owned by the State or by private individuals, necessarily used in the prosecution of the work; but the said lands in this article described shall not include towns, villages, or cities now in existence. In such case only that part shall be considered as embraced in this article as is absolutely essential to the economical prosecution or administration of the work. Over these strips, in time of peace, Nicaragua shall exercise civil jurisdiction, and its inhabitants shall not in any way be considered as impaired in their rights as citizens of the Republic.

ARTICLE VIII. No custom-house tolls or other taxes or impositions of any sort or kind shall be levied by the Government of Nicaragua upon any vessels passing the canal, their cargoes, stores, passengers, crews, or baggage, or for unloading, loading, docking, or repairing vessels, it being the intent of this agreement that vessels, their cargoes, passengers, and crews, shall pass the canal free of any charge, other than that imposed upon them by the two Governments, in their capacities as owners of the work. Nicaragua may, however, provide a police system along the line of the canal to keep the peace and to prevent smuggling into her territory, the reasonable cost of which, as approved from time to time by the board of managers, shall be a charge upon the revenues of the canal.

The board of managers shall have the right to discharge and reload ships in transit, at such points as may be convenient, in order to make repairs, or to lighten the vessel, or to shift cargo, by reason of any cause rendering any of these acts necessary, or may transship cargo without being subject to search, exactions, duties, or taxes of any kind; but before beginning such operations notice thereof must be given to the nearest customs authority.

Article IX. The Government of the Republic of Nicaragua, in conformity with the laws, shall lend its protection to the engineers, contractors, agents, employes, and laborers employed in the construction, maintenance, and management of the canal and its accessories, and they shall be wholly exempt from military requisitions and forced loans; but if any such persons shall acquire real estate outside the strips provided for in Article VIII hereof they shall be subject to the taxes fixed by law.

The Government of Nicaragua guarantees to the canal and its accessories, and to its agents of all classes, security under the laws of the country against domestic acts of hostility, in the same degree as in the case of other inhabitants, employing all its powers for their protection.

Article X. All contracts for the construction, maintenance, and management of the canal and its accessories may be enforced according to the laws of Nicaragua and the provisions of this convention.

Article XI. The canal and its accessories and dependencies of every kind shall be exempt, in peace and in war, from every form of taxation upon real or personal property acquired in virtue of this convention, and from every form of direct or indirect taxation, contributions, local taxes, or other dues in respect to the ownership and use of the canal and its accessories, or of the buildings, or constructions, or equipments, or appliances appertaining thereto, or to the ports and maritime establishments thereof, anywhere in the Republic, and upon the lands set aside for the purposes of the canal and its accessories.

The Republic of Nicaragua binds itself not to establish tonnage dues, anchorage, light, wharf, or pilot dues, or charges of any class whatsoever upon vessels of whatever kind, or upon merchandise, or crews, or passengers, or gold or silver, or diamonds, or anything traversing the canal, all such dues being for the benefit of the two Governments in their capacity as joint owners and managers of the canal and its accessories; but merchandise, loaded or unloaded in any part of the canal or its accessories, coming from or destined to Nicaragua and intended for sale, shall pay dues for exportation or importation, fixed by the revenue laws of Nicaragua.

Article XII. All articles necessary for the construction and repair of the canal and its accessories may be imported without duty or tax of any kind being laid thereon by the Government of Nicaragua, including such iron, steel, locomotives, cars, telegraph wires and instruments, tugs, dredges, and vessels or other things as may at any time be used in the construction, improvement, prosecution or maintenance of the work, or in the maintenance or improvement of the same after its completion; and during the construction of the canal and its accessories, all supplies, whether personal or otherwise, except tobacco, spirits, or wines, used by those engaged in the work, shall be free of any customs or other tax, but no such supplies shall be permitted to be sold to those not actually engaged in the work, or to be smuggled into or sold in the interior.

All vessels in the service of the canal and its accessories, with their equipments and outfits, arriving at any port of Nicaragua from any point whatever, shall be free of all duties and port charges.

Article XIII. For and in consideration of the preceding articles the United States of America agrees to furnish the money and to build the said canal and its accessories, including, if found advisable, the said railway and telegraph line, together with all docks, locks, machine shops, repair shops, annexes, machinery, feeders, &c., it being the intent of this agreement that the United States of America shall build and complete the canal, with everything appertaining thereto, for the safe and speedy passage of the vessels hereinbefore described, and for through communication between ocean and ocean, and such loading and repairing as may be necessary, at their sole cost and without expense to the Government of Nicaragua.

Article XIV. The United States shall have exclusive control of the construction of the canal and railway and telegraph line if the same be built, and shall be invested with all the rights and powers necessary thereto. The management, care, and protection of the canal and its accessories, including the said railway and telegraph line if built, under the general supervision of the two Governments, shall be entrusted to a Board of Managers, which shall consist of six members, three of whom shall be appointed by the President of the United States, by and with the advice and consent of the Senate thereof, should the Senate be in session; or, should the Senate not be in session the three members shall be appointed by the President subject to confirmation by the Senate at its next session, and three by the Republic of Nicaragua. Any vacancy which may occur among the members of the Board, appointed by the President of the United States, shall be filled by the said President, in the manner provided in the United States for filling vacant government offices, and any vacancy which may occur among the members of the Board, appointed by the President of Nicaragua, shall be filled by the said President in the manner provided in Nicaragua for filling vacant government offices. This Board shall be designated as soon as the canal is ready for traffic, and shall determine all questions by a majority vote. The chairman of the Board shall be one of the members appointed by the President of the United States and designated as chairman by him, and in case of a tie the chairman shall have an additional vote. This Board shall be entrusted with the general executive management of the canal and its acces-

TRATADO ENTRE LOS EE. UU. Y LA REPÚBLICA DE NICARAGUA PARA CONSTRUIR UN CANAL INTEROCÉANICO POR EL TERRITORIO DE NICARAGUA.

Los **EE.** UU. de América y la República de Nicaragua, reconociendo la importancia de una comunicación interoceánica por el istmo de Nicaragua, que pueda poner en inmediata comunicación los puertos del Norte y Sur de América y facilitar el comercio entre Europa y los puertos del Pacífico, y los de la parte oriental del Asia y la costa del Atlántico y los puertos de los EE. UU. de las costas del Pacífico y del Atlántico, han decidido construir un canal con este objeto, y á ese fin concluir un tratado; y al efecto han nombrado como sus respectivos plenipotenciarios: el Presidente de los EE. UU. á Frederick Frelinghuysen, Secretario de Estado de lo EE. UU. de América; y el Presidente de Nicaragua, al General Joaquin Zavala, ex-Presidente de la República de Nicaragua, y después de canjearse sus plenos poderes y de encontrarlos en debida forma, han convenido en los artículos siguientes:

Art. I.—El canal se construirá por los EE. UU. de América, y será de propiedad de esta República y de la de Nicaragua y su manejo será como en adelante se expresa.

Art. II.—Habrá perpétua alianza entre los EE. UU. de América y la República de Nicaragua, y los primeros se comprometen á proteger la integridad del territorio de la última.

PLENOS PODERES QUE SE CONFIEREN A LOS ESTADOS-UNIDOS.

Art. III.—Los EE. UU. comenzarán y continuarán hasta su conclusión, tan rápidamente como las circunstancias lo permitan, un canal de navegación para los buques de mayor porte comunmente usados en el comercio, y el mismo queda sujeto á las limitaciones contenidas en el art. XX de este convenio. Este canal seguirá la ruta que se crea más conveniente de océano á océano; y los EE. UU., al construirlo, gozarán de la más completa libertad, tanto en sus obras, como en su locación y dependencias, accesorios y trabajos, así como en la elección de puertos de entrada, en caso que se crea necesario ó conveniente abandonar el cauce del rio San Juan, en cualquier punto y construir un canal lateral.—El Gobierno de Nicaragua se reserva el derecho de pedir el establecimiento de una comunicación especial por medio de esclusas para barcos de seis pies de calado y ciento sesenta de eslora, entre la parte más baja del rio y la usada para los canales, pero el Gobierno de Nicaragua avisará á los EE. UU. tal deseo tan pronto como comiencen los trabajos en el rio, y queda expresamente estipulado que Nicaragua será la única responsable del mantenimiento y conservación de esta vía y de sostener en condiciones navegables dicha parte baja del rio.

Art. IV.—Con el objeto de llevar á cabo este convenio, la República de Nicaragua cede á los EE. UU. el libre uso del lago de Nicaragua y suministrará, libres de todo costo, los espacios necesarios para la construcción, mantenimiento, uso y posesión del canal y para cualquier ensanche futuro del mismo, ya se encuentren tales espacios ó lugares en la tierra firme, en los lagos ó en sus islas, en los rios ó islas de éstos; en los puertos ó caminos hácia ambos océanos, juntamente con sus alrededores y ramificaciones, así como todo el espacio requerido para el depósito de los materiales, de excavaciones, y cortes, de avenidas procedentes de los diques hechos en los rios, para todas las desviaciones de riachuelos procedentes de los canales, así como también para los depósitos de aguas, diques, muelles, arsenales, accesorios de las esclusas, faros, señales, almacenes, talleres, edificios y para cualesquiera otros objetos necesarios, y finalmente todas las tierras, aguas y lugares pertenecientes á la República de Nicaragua, requeridos para la construcción, mantenimiento, uso y explotación del canal, incluyendo un ferro-carril de uno á otro extremo de éste que será virtualmente paralelo al mismo y próximo á la orilla del canal, y á lo largo de la ribera Sur del lago de Nicaragua, como también una línea telegráfica, en caso que los EE. UU. decidan la construcción de dicho ferro-carril ó telégrafo, o de ambos, que serán considerados para todos los fines de este tratado, como parte del canal mientras se conserven.

Art. V.—La obra será declarada de utilidad pública y para el objeto de contruir y llevar á cabo el canal, ferro-carril y línea telegráfica, la República de Nicaragua se encarga de expropiar las tierras pertenecientes á particulares. Cualquiera propiedad ó finca actualmente poseida por particulares ó corporaciones, que hayan de ser tomadas ó usadas por los EE. UU. para la construcción del canal ó sus accesorios, ó para su conservación, lo serán, previa indemnización y entrega del valor de tales propiedades, y el Gobierno de los EE. UU. pagará á los propietarios de dichas fincas el valor fijado por una comisión de peritos compuesta de tres miembros, uno de los cuales será nombrado por el Presidente de Nicaragua, y el tercero elegido por aquellos dos conjuntamente. Los EE. UU. ó la Junta de Gerentes, que luego se indicará según el caso, tendrán el derecho de tomar de los baldíos de Nicaragua, todos los materiales que se necesiten para la construcción, conservación, mantenimiento y uso del canal y de sus puertos, dependencias, accesorios y equipo. Cuando los materiales se tomen de propiedades particulares, los EE. UU. ó la indicada Junta de Gerentes, gozarán de todos los derechos que la República de Nicaragua goza por ley y costumbre. En cuanto al contrato entre el Gobierno de Nicaragua y el Señor F. Pellas relativo á la navegación por vapor, aquel gobierno conviene en que dicho contrato no será considerado de aplicación á las operaciones necesarias de una ú otra parte en cuanto á este convenio, en la construcción y realización del canal ó cualesquiera de sus partes, durante el tiempo que aún falta á dicho contrato, incluyendo en ésta exención todo trabajo necesario en el canal y trasporte por el Lago y ríos de Nicaragua. Además dicho gobierno de Nicaragua conviene en que si el gobierno de los EE. UU. durante el período que falta para concluirse el mismo contrato creyere conveniente comprar el privilegio, propiedad y derechos que ahora tiene el mencionado Señor Pellas en virtud del indicado contrato, el referido privilegio, propiedad y derechos serán expropiados en la misma forma y bajo las mismas condiciones fijadas en este artículo para la adquisición de otras propiedades particulares. En caso que los EE. UU. en la construcción de dichas obras creyere necesario ocupar, cualesquiera terrenos pertenecientes á la República, tendrán derecho de hacerlo, libres de toda carga durante tal ocupación temporal, y las tierras así ocupadas en caso de ser vendidas ó enajenadas en cualquiera forma, lo serán con la reserva de tal derecho de ocupación temporal por los EE. UU.

Art. VI.—Los EE. UU. en toda la extensión del canal y de sus accesorios, dependencias y anexos, así como en sus entradas por ambos océanos y en el lago y río que la ruta del canal atraviese y que pueda usarse de cualquier modo en conexión con las obras de dicho canal, tendrán el derecho de practicar cualesquiera trabajos de cualquier clase que se estime necesario por los ingenieros para la realización de una vía segura, efectiva, durable y rápida para el tránsito de buques de océano á océano sin que hayan de pedir licencia ni se les hará oposición de ninguna clase por parte del Gobierno ó pueblo de la República de Nicaragua, lo mismo que para la construcción del ferro-carril y línea telegráfica indicados.

TERRENOS RESERVADOS.

Art. VII.—Se reservarán y apropiarán por ambas partes contratantes para los fines de la obra una faja de terreno de dos y media millas inglesas de anchura, cuya parte media coincida con la línea central del canal; una faja de dos y media millas de ancho al rededor de la ribera Sur del lago en la parte en que éste se use para los fines del canal, así como tambien otra faja de dos y media millas á lo largo del río donde éste se tome como parte del canal, y donde hayan de pasar el ferro-carril y línea telegráfica arriba indicados fuera de los límites de dicha faja de tierra, se reservará un lote de media milla de ancho cuyo centro coincida con la línea férrea fuera de la faja reservada para el Canal, y todas las tierras mencionadas en este artículo estarán sujetas á las condiciones antes convenidas en cuanto á los terrenos pertenecientes al Estado ó á individuos particulares, que hubieren de usarse en la prosecución de la obra; pero las tierras descritas en este artículo no incluirán las poblaciones, villas ó ciudades que actualmente existan. En cuanto á estas, sólo se considerará incluida en este artículo la parte absolutamente indispensable para la conveniente realización ó administración de la obra sobre tales fajas de tierra. En tiempo de paz, Nicaragua ejercerá su jurisdicción civil y los habitantes de tales lugares no serán absolutamente perjudicados en sus derechos como ciudadanos de la República.

Art. VIII.—No se impondrán por el Gobierno de Nicaragua derechos de Aduana ni otras contribuciones ó recargos de ningún género á los buques que pasen por el Canal ni á sus cargamentos, bodegas, pasajeros, tripulaciones ó equipaje, ni por descargar, cargar, entrar en arsenal ó hacer reparaciones en los buques, siendo el objeto de este convenio que dichos buques, sus cargamentos, pasajeros y tripulación transiten el Canal libres de todo impuesto fuera del señalado por los dos gobiernos como propietarios de la obra. Nicaragua podrá sin embargo colocar un resguardo á lo largo del Canal para mantener el orden y evitar el contrabando dentro de su territorio, y el costo racional del sostenimiento de tal resguardo, aprobado de tiempo en tiempo por la Junta de Gerentes, será deducido de los productos del Canal. La Junta de Gerentes tendrá el derecho de descargar y volver á cargar las naves en tránsito, en los puntos que crea conveniente á fin de hacer reparaciones ó de aligerar la carga, así como de despachar cargamentos por cualquier motivo que estime necesario hacerlo, y podrá trasbordar carga sin estar sujeta á inspección, actas, derechos ó impuestos de ninguna clase, pero ántes de empezar tales operaciones dará noticia de ello á la autoridad aduanera mas cercana.

Art. IX.—El Gobierno de la República de Nicaragua, de conformidad con las leyes, dará su protección á los ingenieros, contratistas, agentes, empleados y trabajadores ocupados en la construcción, conservación y manejo del Canal y sus dependencias, y todos estarán exentos de prestar servicios militares así como de empréstitos obligatorios, pero si cualesquiera de tales personas adquieren propiedades raíces fuera de la faja á que el artículo VII se refiere, estarán sujetos á las contribuciones fijadas por la ley. El Gobierno de Nicaragua garantiza al Canal y sus dependencias, y á sus agentes de todas clases, seguridad, bajo las leyes del país, contra todo acto interior de hostilidad en el mismo grado en que se encuentran los demás habitantes, empleando todo su poder en la protección de los mismos.

Ar. X.—Todo contrato para la construcción, conservación y manejo del Canal y sus dependencias, tendrá la fuerza que le dan las leyes de Nicaragua en los términos de este convenio.

Art. XI.—El Canal y sus dependencias y accesorios de todas clases estarán exentos, tanto en tiempo de paz como de guerra de toda clase de impuestos sobre propiedad raíz ó personal adquirida en virtud de este convenio, así como de toda especie de contribución directa ó indirecta, general ó local ú otros derechos cualesquiera en lo tocante á la propiedad y uso del Canal y sus dependencias, ó de sus edificios y construcciones, ó equipo y anejos pertenecientes á los mismos, y á los puertos y establecimientos marítimos de dicho Canal en cualquier parte de la República y sobre los terrenos reservados para el Canal y sus dependencias. La República de Nicaragua se compromete á no establecer derechos de tonelaje, anclaje, de faro, muelle ni práctico, ni otra, cargas de ninguna clase, sobre los buques de cualquier especie, sobre sus mercaderías tripulaciones, pasajeros, oro, plata, brillantes ú otro cualquier artículo que pase por el Canal, pues tales derechos corresponden á ambos Gobiernos en su calidad de copropietarios y administradores del Canal y sus dependencias; pero las mercaderías, cargadas ó descargadas en cualquier parte del Canal ó de sus dependencias, procedentes de Nicaragua ó destinadas á ellas, para la circulación comercial, pagarán los derechos de exportación ó importación fijados por las leyes de Nicaragua.

EXENCION DE DERECHOS SOBRE MATERIALES.

Art. XII.—Todos los artículos necesarios para la construcción y reparaciones del Canal y sus accesorios serán introducidos sin derecho ni recargo de ningún género, impuesto sobre los mismos por el Gobierno de Nicaragua, debiendo incluirse en ellos el hierro, acero, locomotoras, carros, alambres é instrumentos telegráficos, excavadoras, dragas y naves ó cualesquiera otras cosas que puedan en cualquier tiempo usarse en la construcción, mejoramiento, prosecución y mantenimiento de la obra ó en el mantenimiento y mejoras de la misma después de su conclusión; y durante la construcción del Canal y sus dependencias todos los artículos de consumo personal ó general, excepto tabaco licores y vinos, que hayan de usarse por los que estén ocupados en los trabajos, serán libres de todo derecho ó impuesto; pero no se permitirá vender tales artículos de consumo á los que no estén ocupados activamente en la empresa, ni hacer contrabando con ellos ni venderlos en el interior. Todas las naves que estén al servicio del Canal y sus dependencias, con su equipo y aparejo, que llegaren á cualquier puerto de Nicaragua, procedentes de un punto cualquiera, estarán libres de todo derecho é impuesto de puerto.

Art. XIII.—En consideración á los artículos precedentes y á las concesiones en ellos establecidas, los EE. UU. de América se comprometen á suministrar el dinero para la construcción de dicho Canal y sus dependencias, incluyendo, si lo creyeren necesario, las indicadas líneas férrea y telegráfica, así como todos los arsenales, esclusas, talleres y sus anejos, maquinarias, depósitos, &.; por cuanto el objeto de este convenio es que los EE. UU. construyan y lleven á cabo el Canal y cuanto al mismo corresponda para el tránsito seguro y rápido de los buques á que anteriormente se ha aludido y para la comunicación entre uno y otro océano, así como para cargar y hacer reparaciones en los buques cuando fuere necesario, de su propia cuenta y costo y sin ningún gasto de parte del Gobierno de Nicaragua.

INTERVENCION EXCLUSIVA CONCEDIDA A LOS EE. UU.

Art. XIV.—Los EE. UU. tendran el manejo exclusivo de la construcción del Canal así como del ferro-carril y telégrafo, si éstos se llegaren á construir, y serán investidos con todos los derechos y poderes necesarios á este respecto. El manejo, cuidado y protección del Canal y de sus dependencias; inclusos el ferro-carril y línea telegráfica, si se llegaren á construir bajo la inspección general de los dos Gobiernos, serán encargados á una Junta de Gerentes, compuesta de seis miembros, tres nombrados por el Presidente de los EE. UU. por medio y con el consentimiento del Senado de la República, si éste se encontrare reunido; ó en caso que el Senado estuviere en receso, los tres miembros serán designados por el Presidente, sujetándose á la ratificación del Senado en su próxima reunión; y los otros tres por la República de Nicaragua. Cualquiera vacante que ocurra entre los miembros de la Junta, nombrados por el Presidente de los EE. UU. se repondrá por dicho Presidente, según ley de los EE. UU. para la reposición de las vacantes de los empleados de Gobierno; y cualquiera vacante que pueda ocurrir entre los miembros de la Junta designada por el Presidente de Nicaragua, será repuesto por dicho Presidente, conforme á lo acostumbrado en Nicaragua, en la reposición de empleados del mismo Gobierno. Esta Junta será designada tan pronto como el Canal esté listo para el tráfico, y decidirá todas las cuestiones por el voto de la mayoría.—Será Presidente de la Junta uno de los miembros designados por el Presidente de los EE. UU. y nombrado tal por aquel; en caso de empate, el Presidente de la Junta tendrá un voto adicional. Esta Junta estará encargada del manejo ejecutivo del Canal y sus accesorios, incluyendo dicho ferro-carril y línea telegráfica, si fueren construidos, y todos los asuntos concernientes á la conservación y mejora de los mismos; fijará los impuestos y dará las disposiciones y reglamento para el manejo de los mismos. Su acción estará sin embargo sujeta en todo tiempo á la dirección auxiliar de los Presidentes de ambas Repúblicas, la cual estarán obligados á obedecer implícitamente. La mencionada Junta de Gerentes tendrá el derecho y la facultad de designar los impuestos y cobrarlos tanto á los vapores, buques y naves de cualquiera clase que entren al Canal ó los puertos de ambos extremos del mismo Canal, como de los pasajeros, mercaderías y carga de todas clases, por tránsito, navegación, tonelaje, derechos de faro y puerto, así como también de remolque, almacenaje, anclaje, muellaje, hospital y otros impuestos semejantes. El Gobierno de Nicaragua garantiza el cumplimiento de tales estipulaciones adoptadas por la Junta de Gerentes como si procedieran del Gobierno de Nicaragua.—Los impuestos aquí referidos serán iguales para los buques de las dos partes que intervienen en este Tratado y los de todas las naciones, excepto los que sean de propiedad y estén bajo el mando de ciudadanos de cualquiera de las dos partes contratantes, y que se ocupen del cabotaje, los cuales serán favorecidos. Las embarcaciones nicaragüenses que usen solamente una porción del Canal, pagarán derechos proporcionales y no pagarán absolutamente ningún derecho en la parte en que el Canal utilice cualquiera porción navegable en la actualidad.

Art. XV.—Los libros y negocios de dicha Junta de Gerentes estarán sujetos á la inspección y exámen que los Presidentes ambas Repúblicas quisieren hacer en cualquier tiempo. La junta de Gerentes pasará en los primeros días de enero, abril, julio y octubre de cada año sucesivo, una memoria total y completa de sus transacciones durante el precedente trimestre, y el Presidente de cada una de las Repúblicas, puede además, en cualquier tiempo, pedirles otros datos semejantes ó mas detallados, según lo estimaren conveniente. La Junta de Gerentes nombrará y removerá todos los empleados ocupados en el

Annex 24

COSTA RICA-NICARAGUA TREATY OF PEACE, COMMERCE AND EXTRADITION (ESQUIVEL-CHAMORRO), SAN JOSÉ, PREAMBLE, ARTICLES VII, XVIII, XXVIII AND XXXII, 9 OCTOBER 1885

SOURCE: J. M. BONILLA, *COLECCIÓN DE TRATADOS INTERNACIONALES* (MANAGUA: TIPOGRAFÍA INTERNACIONAL, 1909), PP. 489-491, 493-494, 496-497.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Costa Rica-Nicaragua Treaty of Peace, Commerce and Extradition (Esquivel-Chamorro), San José, 9 October 1885

"The President of the Republic of Nicaragua and the President of the Republic of Costa Rica, desirous of strengthening as much as possible the relations between both countries and to serve to their common interests by means of a Peace, Friendship, Commerce, and Extradition Treaty, have agreed to start negotiations towards this purpose…"

…

Article VII: "…particularly in regard to freedoms and personal and domiciliary guarantees, to the means of acquiring goods of any kind, to possess, preserve and transfer them …"

…

Article XVIII: "…that the imports and exports made from one point to the other, either by sea or land, of the articles or natural products from the country…To avoid any doubt, as well as any fraud, it is stated: that the products mentioned in this article are those of free trade in the country where they are introduced and it is agreed that said products, when introduced into the territory or domains of one party, shall be accompanied by a bill of lading issued by the competent authorities of the other in which the origin of said products from that party shall be certified…"

…

Article XXVIII: When the extradition proceeds, all objects seized that have any relation to the crime and its perpetrators shall be rendered…"

…

Article XXXII: "The expenses incurred by the maintenance and transfer of the requested individual, as well as the delivery and transport of the objects that by having relation..."

…

TRATADO

-DE-

PAZ, AMISTAD,

COMERCIO Y EXTRADICION

ENTRE

NICARAGUA Y COSTA RICA

* * *

CHAMORRO-ESQUIVEL

1885

EL Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar, tanto como sea posible las relaciones de ambos países y de servir á sus comunes intereses, por medio de un Tratado de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este objeto, dando el Presidente de Nicaragua sus amplios poderes al señor General don Pedro Joaquín Chamorro, Enviado Extraordinario y Ministro Plenipotenciario, ante el Gobierno de Costa Rica y el Presidente de Costa Rica al señor Licenciado don Ascensión Esquivel, Secretario de Estado en el Despacho de Relaciones Exteriores de la República, quienes después de haber presentado sus Plenos Poderes, de haberlos canjeado y encontrado con toda la regularidad debida, han convenido en los artículos siguientes:

Artículo I.

Habrá perfecta paz, perpetua y sincera amistad entre las Repúblicas de Nicaragua y Costa Rica.

Artículo II.

En ningún caso Nicaragua y Costa Rica se harán la guerra. Si entre ellas llegare á surgir alguna diferencia, se darán las debidas explicaciones; y no pudiendo avenirse en el asunto ocurrido, adoptarán precisa é ineludiblemente para terminarlo, el medio humanitario y civilizado del arbitraje.

Artículo III.

Las relaciones comerciales de una República con la otra, en ningún caso podrán cerrarse, si no es á consecuencia de una declaratoria formal de guerra entre las partes contratantes, lo cual es casi imposible, desde luego que al deber y buen nombre de ellas cumple guardar lo estipulado en los artículos precedentes.

Artículo IV.

Si por desgracia alguna Nación hiciere la guerra á Nicaragua ó á Costa Rica, las partes contratantes convienen en no hacer alianza ofensiva, ni prestar ninguna clase de auxilios á los enemigos de ninguna de las dos Repúblicas; pero esto no obsta á que puedan celebrar alianzas para la defensa de sus derechos ó la de sus respectivos territorios en caso de ser invadidos.

Artículo V.

Si el desacuerdo ó desavenencia ocurriere entre otros Estados de Centro América, las partes contratantes, de común acuerdo, ó cada una por sí, ofrecerán á aquellos sus buenos oficios, y mediarán á fin de mantener la armonía general en Centro América.

Artículo VI.

Si se suscitare cuestión entre uno de los Gobiernos contratantes y alguna Potencia extranjera, el otro ofrecerá sus buenos oficios, excitando á la vez á los demás Gobiernos de Centro América, á que por su parte hagan lo mismo, hasta lograr un arreglo equitativo y satisfactorio. Este compromiso deberá cumplirse desde que se tenga conocimiento de la cuestión y los correspondientes informes de su naturaleza y circunstancias.

Artículo VII.

Debiendo las Repúblicas contratantes considerarse recíprocamente como hermanas, se declara y establece que, en cuanto lo permitan las Constituciones que ahora las rigen, y lo más, pero no lo menos, que franqueen las venideras, los nicaragüenses en Costa Rica y los costarricenses en Nicaragua, gozarán de los mismos derechos políticos que incumben á los naturales. En consecuencia, para que sea eficaz este propósito, el Gobierno de Costa Rica se compromete á procurar la reforma de su Constitución vigente, en el sentido de que se conceda á los nicaragüenses y demás centroamericanos el goce completo de los derechos políticos; pues por lo que hace á Nicaragua, no presentando inconvenientes su Constitución actual, queda desde ahora otorgado á los costarricenses. En cuanto á los derechos civiles, dicho goce y equiparación serán desde luego absolutos, sin reserva ni diferencia alguna, especialmente en cuanto á libertades y seguridades personales y de domicilio: á los medios de adquirir bienes de toda clase, poseerlos, conservarlos, trasferirlos, y trasportarlos dentro y fuera de la República y al libre ejercicio del comercio y la navegación: todo sin otras limitaciones, formalidades é impuestos nacionales ó municipales, que aquellos á que están ó llegaren á estar sujetos los naturales.

Artículo VIII.

El ejercicio de derechos políticos, y la admisión y servicio de cualquier empleo ó cargo público, por parte de los ciudadanos de una República en la otra, nunca y en ningún caso podrán afectar la nacionalidad ni la ciudadanía de su origen, mas en la República donde tales derechos y empleos ó cargos ejerzan están sujetos á todos los cargos y servicios obligatorios á los naturales.

Artículo IX.

Los costarricenses en Nicaragua y los nicaragüenses en Costa Rica podrán ejercer, con arreglo á las leyes del país en que residan sus profesiones ú oficios, sin más requisitos que la presentación del título debidamente autenticado, la justificación de la identidad de la persona, si fuere necesaria, y el pase correspondiente del Gobierno Supremo. También tendrán el derecho de incorporar en la Universidad ó Colegio respectivo, sus cursos académicos, previa la autenticación ó identidad referidas.

Artículo X.

Los documentos, títulos académicos, diplomas profesionales y escrituras públicas de cualquiera naturaleza que sean, extendidos, ú otorgados conforme á las leyes de la una ó de la otra República, respectivamente, valdrán en aquella donde se presenten para que tengan sus efectos, y se les dará entera fe si conviniesen los requisitos necesarios de autenticidad. Los Tribunales evacuarán los exhortos y demás diligencias judiciales, habiendo para ello solicitud de autoridad legítima, enviada en forma, y un encargado de la parte interesada para proveer lo que el caso demande.

si no es en el caso de que hayan agotado en la respectiva demanda, todos los recursos que para ante autoridades del país las leyes del mismo franqueen á los naturales.

Artículo XV.

En cuanto á los daños ó perjuicios que el nacional de una de las Repúblicas contrayentes recibiese en el territorio de la otra, el Gobierno de ésta no será responsable, si no es que sean causados por agentes del mismo Gobierno ó autoridad del país, en cuyo caso los perjudicados deben ser atendidos por las autoridades de la República donde lo han sido, y obtener de ellas la debida justicia, bajo las mismas leyes á que están sujetos los nacionales, de tal suerte, que los naturales de una de las partes contratantes, en ningún caso serán de mejor condición que los de la otra.

Artículo XVI.

Ambas Repúblicas se comprometen á fijar las bases para establecer y mantener una representación común en el exterior, para procurar una legislación uniforme y para constituir un sistema común de pesas, medidas y monedas, sobre la base decimal, todo en el más corto plazo posible.

Artículo XVII.

Cuando la Constitución de Costa Rica abra el campo que la de Nicaragua y la oportunidad se presente, de celebrar concierto para la Unión centroamericana, los Gobiernos contratantes se empeñarán de consuno en la realización de esa grande idea. Cualquiera de los dos que la intente ó que sea invitado para ella, deberá dar al otro noticia inmediata y completa de las negociaciones que ocurran, desde el momento en que se inicien, y á medida que se vayan verificando.

Artículo XVIII.

No pudiendo considerarse rigurosamente las Repúblicas de Nicaragua y Costa Rica como Naciones extranjeras, por razón de su común origen, por las conexiones é intereses territoriales, comerciales y políticos que las han ligado y las ligan, se declara y establece, respecto de sus particulares y propias producciones: que las importaciones y exportaciones que se hagan de uno á otro punto, ya sean por mar ó tierra, de los artículos ó productos naturales, propios del país que los remite, no pagarán derechos ni impuestos de ninguna clase, sean fiscales ó locales. Para evitar toda duda, lo mismo que cualquier fraude, se explica que los productos de que habla este artículo son los de libre comercio en el país donde se introducen; y se conviene en que dichos productos, al ser introducidos en el territorio ó dominios de la una parte, deberán ir acompañados de una guía expedida por las autoridades competentes de la otra, en que se hará constar ser de ellas el origen ó procedencia de dichos productos: esto por lo que hace á la importación: mas respecto á la exportación, el que la verifica tiene la obligación de presentar dentro de dos meses la correspondiente torna-guía, si esto se le exigiere.

Artículo XIX.

Las Repúblicas contratantes se entregarán recíprocamente los individuos prófugos de la una refugiados en la otra, que estuvieren procesados ó sentenciados como autores, cómplices ó encubridores de los delitos de homicidio, incendio, robo, abigeato, piratería, peculado, falsificación de moneda, sellos ó instrumentos públicos, bonos y documentos de crédito del Estado, billetes de banco, ó cualquier otro valor público, defraudación de las rentas públicas, quiebra fraudulenta, falso testimonio, y por cualquier otro delito que tenga señalada pena de muerte, penitenciaría, presidio, trabajos forzados ó prisión, que no baje de dos años en la Nación en que se hubiesen cometido, aunque la pena sea menor ó distinta en la del refugio.

Artículo XX.

La pena de dos años de prisión mencionada en el artículo anterior, señala solamente la naturaleza de los delitos que motivan la extradición, cuando ésta se pide durante el enjuiciamiento: pero no limita los efectos del juicio, si por circunstancias atenuantes ú otros esclarecimientos, favorables al reo, fuese éste sentenciado á sufrir pena menor.

Artículo XXI.

Para los efectos de la extradición, se comprenden en la jurisdicción de la República, á la cual aquella se pide, sus arresto provisional se verificará en la forma y según las reglas establecidas por la legislación del país del asilo; pero cesará, si en el término de un mes contado desde que se verificó, no se formalizase la reclamación indicada en el artículo precedente.

Artículo XXVII.

Si el reo fuere ciudadano del país en que se ha refugiado y se solicitare su extradición para que sufra la pena impuesta por sentencia ejecutoriada, emitida con su audiencia, se entregará con sujeción á lo dispuesto en los artículos XXII, XXIII y XXIV; pero si la extradición se pidiese por causa de enjuiciamiento, el Gobierno no está obligado á concederla, si el reo prefiriese ser juzgabo por los Tribunales de su país; en este caso, con los antecedentes recogidos en el punto donde se hubiese cometido el delito, y después de evacuarse los exhortos que se creyeren convenientes, el Juez del domicilio del reo, ó el de la capital, si no lo tuviere, deberá seguir el proceso hasta terminarlo; y el Gobierno del país del juzgamiento, informará al otro Gobierno del resultado definitivo.

Artículo XXVIII.

Cuando haya lugar á la extradición, todos los objetos aprehendidos que tengan relación con el delito y sus autores, se entregarán sin perjuicio del derecho de tercero, á la República reclamante. Dicha entrega se verificará aunque por la muerte ó fuga del inculpado, no pueda llevarse á efecto la extradición.

Artículo XXIX.

No será concedida la extradición si el reo reclamado hubiese sido ya juzgado y sentenciado por el mismo hecho en la República donde reside, ó si conforme á las leyes de la República que la solicita, hubiesen prescrito la acción ó la pena.

Artículo XXX.

Si el reo, cuya extradición se solicita estuviese acusado ó hubiese sido condenado por crimen ó delito cometido en la jurisdicción territorial de la República en que se encuentra, no será entregado sino después de haber sido absuelto ó indultado, y, en caso de condenación, después de haber sufrido la pena.

En los casos en que el reo, cuya entrega se pide, hubiese contraído obligaciones que no pueda cumplir á causa de la extradición, ésta se llevará siempre á efecto, quedando la parte interesada en libertad de gestionar sus derechos ante la autoridad correspondiente.

Artículo XXXI.

Cuando el acusado ó condenado, cuya extradición se solicite por una de las partes contratantes, fuere igualmente reclamado por otro ú otros Gobiernos, á causa de crímenes ó delitos, cometidos en jurisdicción de ellos por el mismo culpable, éste será entregado de preferencia al Gobierno que primero hubiese hecho la demanda de extradición.

Artículo XXXII.

Los gastos que causen el mantenimiento y trasporte del individuo reclamado, y también la entrega y traslación de los objetos que por tener relación con el delito deban restituirse y remitirse, serán á cargo de la República que solicite la entrega.

Artículo XXXIII.

Si además de los exhortos para la deposición de testigos domiciliados en el territorio del otro Estado, la autoridad del país del exhorto, conceptuase necesario el comparendo de dichos testigos ó de otros á quienes no se hubiese referido el exhorto, el Gobierno de quien dependen unos y otros testigos, procurará corresponder á la invitación que le haga el otro Gobierno solicitando el comparendo. Si los testigos consintiesen en ir, los Gobiernos respectivos se pondrán de acuerdo para fijar la indemnización debida, que se les abonará por el Estado reclamante, en razón de la distancia, y de la permanencia, anticipándoles la suma que necesiten. Igual convenio celebrarán las partes contratantes para proporcionarse recíprocamente, siempre que sea posible, los demás medios de prueba correspondientes á la instrucción criminal en el respectivo país.

Artículo XXXIV.

Los Gobiernos contratantes se comprometen á comunicarse recíprocamente la sentencia condenatoria por el crimen

Annex 25

CONTRACT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF NICARAGUA AND THE NICARAGUA CANAL ASSOCIATION OF NEW YORK FOR THE OPENING OF AN INTER-OCEANIC CANAL (CÁRDENAS-MENOCAL), MANAGUA, ARTICLES VII, XIII, XVI, XXX AND XL, 23 MARCH 1887

SOURCE: *REPORT OF THE ISTHMIAN CANAL COMMISSION, 1899-1901* (WASHINGTON: GOVERNMENT PRINTING OFFICE, 1904), PP. 389-392, 394-396

58th Congress, 2d Session. } SENATE { Document No. 222.

REPORT

OF THE

ISTHMIAN CANAL COMMISSION,

1899-1901

REAR-ADMIRAL JOHN G. WALKER,
United States Navy,
President.

HON. SAMUEL PASCO.
MR. GEORGE S. MORISON.
LIEUT. COL. OSWALD H. ERNST,
Corps of Engineers, U. S. Army.
LEWIS M. HAUPT, C. E.

ALFRED NOBLE, C. E.
COL. PETER C. HAINS,
Corps of Engineers, U. S. Army.
WILLIAM H. BURR, C. E.
PROF. EMORY R. JOHNSON.

LIEUT. COMMANDER SIDNEY A. STAUNTON,
United States Navy,
Secretary.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1904.

The grantee company shall have the right to establish such telegraph lines as it may deem necessary for the construction, management, and operation of the canal. The Government shall have the right to occupy these lines for the public service without any remuneration to the company.

Article VI.

The Government of the Republic declares, during the term of this concession, the ports at each extremity of the canal, and the canal itself, from sea to sea to be neutral, and that consequently the transit through the canal in case of war between two powers or between one or more and Nicaragua shall not be interrupted for such cause; and that merchant vessels and individuals of all nations of the world may freely enter the ports and pass through the canal without molestation or detention.

In general, all vessels may pass through the canal freely, without distinction, exclusion, or preference of persons or nationality, provided that they pay the dues and observe the regulations established by the grantee company for the use of the said canal and its dependencies. The transit of foreign troops and vessels of war will be subjected to the prescriptions relating to the same established by treaties between Nicaragua and other powers or by international law. But entrance to the canal will be rigorously prohibited to vessels of war of such powers as may be at war with Nicaragua or with any other of the Central American Republics.

Nicaragua will endeavor to obtain from the powers that are to guarantee the neutrality, that in the treaties that shall be made for that purpose, they shall agree also to guarantee a zone of land parallel to the canal and also a maritime zone in both oceans, the dimensions of which will be determined in such treaties.

Article VII.

This present agreement, with all its charges and advantages, shall be the object of a company of execution in agreement with Articles I, X, and those following thereafter.

Said company shall be the grantee, and whenever said name is used in this present contract, reference is made to it.

Article VIII.

The present concession is transferable only to such company of execution as shall be organized by the Nicaragua Canal Association, and in no case to Governments or to foreign public powers. Nor shall the company cede to any foreign Government any part of the lands granted to it by this contract; but it may make transfers to private parties under the same restriction.

The Republic of Nicaragua cannot transfer its rights or shares by selling them to any Government.

Article IX.

The people of all nations shall be invited to contribute the necessary capital to the enterprise, and it shall be sufficient for the fulfillment of this requirement to publish an advertisement for thirty (30) consecutive days in one of the principal daily papers of each of the cities New York, London, and Paris.

The capital stock of the final company shall be composed of shares, bonds, or obligations of any other kind, in such proportion as it may deem convenient. The issue and transfer of these obligations shall be exempt from stamp dues and from any other imposts or taxes established or that may be hereafter established in the Republic.

Of the capital with which the company shall organize, and which it proposes to distribute among the different countries interested in the enterprise, there shall be reserved at least five (5) per cent for the Central American Government and citizens that may desire to subscribe.

As soon as the company is ready to open subscription books it shall advise the Government of Nicaragua, which will invite the other Governments and through them private parties to subscribe. All such shares not taken within six months, following the date on which the Government shall have been advised of that circumstance, shall remain subject to the free disposition of the company.

Article X.

The company shall be organized in the manner and under the conditions generally adopted for such companies. Its principal office shall be in New York, or where it may be deemed most convenient, and it may have branch offices in the different countries of Europe and America, where it may consider it expedient.

Its name shall be the "Maritime Canal Company of Nicaragua," and its board of directors shall be composed of persons, one-half at least of them, shall be chosen from the promoters who may yet preserve their quality as such.

ARTICLE XI.

The Government of Nicaragua in its character of shareholder in the company of execution, as hereinafter provided, shall have the perpetual right of naming one director, who shall be an integral part of the board of directors of the company, with all the rights, privileges, and advantages conferred upon them by the statutes of the company and the laws of the country under which it shall organize.

The Government shall also have the right, in its aforesaid capacity of shareholder, to take part in such elections as the company may hold.

ARTICLE XII.

The company is bound to keep a representative in Nicaragua vested with all powers necessary for the proper conduct of the service and for the transaction of its business with the Government.

ARTICLE XIII.

The canal will follow the valley of the River San Juan to Lake Nicaragua, through which will be designated the most convenient route for communication with the Pacific Ocean. In any event, the company shall have the most ample freedom to select the route which it considers most convenient between the two oceans, for the excavation of the canal and its dependencies and its ports, particularly those serving for entrance and exit on both oceans. The company shall have the same liberty to adopt the route which may be deemed most advantageous and economical for the construction of the canal, after the final survey by a commission of competent engineers.

However, should the company, after the survey of the river San Juan, find it necessary to abandon, in any place, the bed of the river, and cut a lateral canal, the Government of Nicaragua reserves the right of requiring from the company the duty of establishing a communication between the part of the San Juan, not used for canal purposes, and the dividing level of the canal, by means of a lock, or a series of locks, suitable for the navigation of ships of six feet draft. As soon as the final plans are adopted and laid before the Government, it shall notify the company within one month after their receipt whether or not they meet with its approval, in order that the company may proceed in accordance therewith. It is understood that this duty does not in any manner compel the company to place or maintain, in navigable condition for small craft, the lower part of the river which these locks may be intended to place in communication with the canal.

ARTICLE XIV.

Within three years, to be counted from the commencement of the work upon the Interoceanic Canal, the company shall, at its own expense, construct a navigable canal between Lake Managua and the navigable part of the Tipitapa River, near Pasquier, of sufficient dimensions to admit of the free passage of vessels drawing six feet and of 150 feet in length. When completed this canal shall be taken possession by the Government of Nicaragua, and will be, after that date, the property of the Republic, which, by virtue of its ownership, shall be bound to bear all expenses required in the future for the service, maintenance, repair, and operation of the canal. But the company shall have the right to make use of it for all purposes useful for the maritime canal enterprise, and to pass through it freely with its vessels, and those belonging to contractors employed in the service of the Interoceanic Canal, during the term of this concession, without being subject to any charge whatever, or to pay tolls or contributions of any kind to the Government of Nicaragua or to any person or company that may, through any cause, be in charge of the administration and operation of the work and its dependencies.

The Government of Nicaragua will place at the disposal of the company, free of all expenses and charges, all the lands that may be required, as well as the materials found thereon, or on those belonging to the Government and that may be utilized by the company in the execution of this work.

ARTICLE XV.

All expenditures for surveys, construction, maintenance, and operation of the Interoceanic Maritime Canal shall be borne by the concessionary company, without any subvention in money nor guaranty of interest on the part of the Republic, nor other concessions than those specified in the present agreement.

Article XVI.

The Company shall construct, at its expense, and maintain in good condition, two large ports, one in the Atlantic and one in the Pacific, to serve as termini of the canal, each of them to have a lighthouse of the first order. It shall also construct at the two points on the borders of the lake, where the canal disembogues, two ports of lesser size, with the respective lighthouses.

The company is also obliged to maintain and improve said ports by means of dredges, dikes, piers, embankments, or any other works it may deem advisable, having always in view the good service of the traffic through the canal.

It may, for this purpose, select on the coasts of the two oceans, within the territory of Nicaragua, the localities which the surveys made indicate as preferable.

Article XVII.

All the space necessary, whether on the main land, in the lake, and its islands, at the ports, roadsteads, or rivers of the two oceans, for the establishment of the canal, its paths, and embankments, for depositing the materials from the excavations, and cuttings for the necessary spaces to be occupied by water after raising the dams which are to be constructed in the bed of the river, for all necessary deviations of streams, as well as for reservoirs, dikes, spaces about the locks, stations, lights and beacons, storehouses, buildings and workshops, deposits for materials, and also all those spaces necessary for the routes, service railways, and canals of the same nature for the transportation of the materials to the line of the work and for feeders for the canal; in short, all lands and places necessary to the construction and operation of the canal, as laid down in the drawings and plans made by the engineers of the company, shall be placed at the disposal of the company by the State, under the conditions set forth in the following articles.

Article XVIII.

Said lands belonging to the State will be given to the company without any compensation whatever; and, with regard to those belonging to private parties, the State charges itself with their expropriation if the company so requests. The compensation which may be required in this case shall be paid by the company.

Article XIX.

In all relating to the appropriation that may be made in conformity with the preceding article, the company shall enjoy all the immunities and privileges which the laws of the country accords to the State; so that in no case shall the company be obliged to pay more than the State would under similar circumstances.

Article XX.

The Government obliges itself to place the company, within six months after its request, in possession of up to one thousand (1,000) manzanas of land between the lake and the Pacific, at such places as the company shall designate, but they are to serve exclusively for cutting the canal, its havens, ports, and other accessory works. The Government shall on its own account cause the necessary expropriation to be made, and the company shall pay to it for all indemnity the sum of fifty thousand dollars ($50,000.00) American gold. This payment to be made by the company in Managua within four months after the date of its request.

Article XXI.

The company shall have the right to take, free of charge, from the public lands, for the purpose of construction, operation, and maintenance of the canal, whatever materials may be found on them, especially timber for construction and for fuel, the lime, stone, clay for bricks, and earth for fillings as may be necessary. As regards materials found on private lands, the company shall pay for what it may need thereof, enjoying in this respect the same rights and privileges which the State enjoys according to law.

Article XXII.

Should the company require to occupy, temporarily and during the construction of the canal, lands in the territory of Nicaragua which are not included in those designated in articles 17, 18, and 21, it shall not be obliged to pay any indemnity for them if they are public lands; and the State shall not have the right to sell or dispose of them in any other manner after the make compensation to their owners according to law, without any right on the part of the expropriated owners to reclaim against the company.

Should the company have improved the lands so taken for purposes of use, ornament, or pleasure the State shall be bound to reimburse it for such damages as it may have suffered, according to the assessment of experts.

ARTICLE XXVI.

Mines of coal, stone, gold, silver, iron, or other metals situated in the lands granted to the company shall belong to it by right, without need of previous "denounciation," it having the right to work them when considered expedient, subject to the laws of the country.

ARTICLE XXVII.

The company shall also have the right to utilize for its account, for sale or exportation, the lumber in the forests, situated in the lands ceded to it by the State, from the time they enter into possession of them in accordance with this contract; that is, from the time of commencement of the works, always saving the acquired rights.

ARTICLE XXVIII.

From the day on which the present concession is ratified by Congress the public lands included in those necessary for the construction of the canal can not be sold, nor can any of those ceded to the company on the banks of the canal by article 23. Nor can they be leased to the prejudice of the company.

ARTICLE XXIX.

The company shall have the right, throughout the extent of the canal as well as at its mouths on both oceans, and in the lake and throughout the extent of the lands ceded by virtue of Articles 16, 17, 22, and 23, to enter upon the work of locating, leveling, excavating, dredging, and in general any other work of whatsoever nature that may be judged useful for the establishment and feeding of the canal, or for its operation, preservation, and maintenance. The company is specially authorized to execute along the canal line and on the banks of the River San Juan and its affluents, within the territory of Nicaragua, and also on the tributaries of Lake Nicaragua, the lakes or water courses which can be utilized in their flow to the Pacific, the system of dikes, rectifications, dredgings, embankments, dams, cuts, location of buoys, and in general all the works that in the opinions of the engineers of the company are deemed indispensable for the construction, feeding, navigation, and operation of the canal. The company may also do all works of like character deemed necessary at the entrances of the canal into Lake Nicaragua, as well as in the lake itself, in accordance with the route that may be determined upon in order to secure in it easy navigation, and as may be found necessary in the other lakes or lagoons that are to be traversed.

The embankments, fillings, and dikes formed in the mouths of the canal in the lake and in the ports on the ocean, by deposits of materials resulting from the excavations of the canal, shall belong in fee simple to the company; the Government having the right to use them if necessary, after compensation made. But it may never obstruct said ports nor widen the beaches in front of them, unless there is absolute necessity to do so, and in this case the embankments and fillings that it may be necessary to construct in front of the ports shall belong to the Republic.

In general the company shall have the right to use all the lakes and rivers of Nicaragua, the waters of which may be necessary, in the judgment of the engineers of the company, for the construction and supply of the canal and for maintaining its operations. It being understood that the damages caused to private parties by the deviation of the water courses shall be compensated for by the company according to a just assessment by experts in agreement with the laws of the Republic.

ARTICLE XXX.

The company shall not import merchandise into the territory of the Republic, for the purpose of trafficking, without paying the import duties established by law. But it may import free of custom duties, and of any tax whatsoever, the articles needed for the works of the enterprise, such as surveys, examination of localities, construction, use, operation, maintenance, repairs, and improvements of the canal; for the telegraphic service and for that of the railways; for running the workshops the company may keep in operation; and such articles may consist of tools, machinery, apparatus, coal, limestone of all classes, lime, iron, and other metals, raw or manufactured, mining powder, dynamite, or any other analogous substance. These articles may be transported between whatever points they may be required during the works of opening of the canal, and be discharged and stored free of all local taxes.

The company may import free of duties and taxes, during the work on the canal, provisions and medicines absolutely necessary for its own consumption. Goods, the commerce of which is not free, are excepted from the privileges contained in this article, which goods, excepting powder, dynamite, and other explosives, remain subject to the requisites and duties prescribed by the laws.

Article XXXI.

The vessels employed by the company as tugboats or for the service of the canal shall be free from all duties and also the materials for their repair and the fuel they use. The vessels and appurtenances from whatever place they may be coming for the use of the company shall also be exempt from all duties.

Article XXXII.

The Government will establish such regulations as it may judge necessary to prevent smuggling and to maintain public order in the region of the canal.

The company is bound to lend its assistance for the enforcement of such regulations. But in the free zone along the margin of the canal, as hereinafter provided, measures for the prevention of smuggling shall be limited to vigilance on the part of the employe or employes whom it may concern without any further measures being taken against passengers, vessels, or their cargoes, excepting when an attempt at smuggling is discovered; it being the intention of the State that there should be the most ample liberty of transit by the canal for persons and property, with the sole limitations established by this contract. Consequently the company shall have the right to discharge and reload ships in transit at such points as may be necessary in order to make repairs, lighten the vessel, shift cargo, or on account of any accident that renders it absolutely necessary, without being subject to search, exactions, or contributions of any kind, provided that in each case, and before beginning operations, the nearest customhouse authority shall be notified.

Article XXXIII.

The Government shall lend its protection, in conformity with the laws of the country, to the engineers, contractors, employes, and laborers engaged in the preliminary surveys or in the works of construction and operation of the canal.

Article XXXIV.

The company shall be exempt from all forced loans and military exactions in time of peace and of war. The foreign agents and employes shall likewise be exempt from direct contributions, forced loans, and military exactions during the time they are in the service of the canal, but they shall pay the taxes established by the laws if they acquire real property.

Article XXXV.

The company may freely introduce immigrants into the lands ceded to it, and the employes and workmen needed in its works and workshops. Asiatics, however, are excepted. Both the immigrants and the employes and workmen will be subject to the laws of the Republic and the regulations of the company. The Government assures them aid and protection and the enjoyment of their rights and guarantees in conformity with the constitution and the national laws during the time they remain on Nicaraguan territory.

Article XXXVI.

The Government of Nicaragua assures to the company and its agents, under the laws of the country, as it does to the other inhabitants, the full enjoyment of the guarantees and rights which the constitution and the same laws grant to them. And reciprocally the company and its agents bind themselves strictly to respect the laws and regulations that are in force in Nicaragua, and especially to comply with the executory judgments of the tribunals without considering themselves vested with other rights than those which the laws concede in favor of the Nicaraguans.

ARTICLE XXXVII.

The Government shall establish all along the line of the canal included between the two terminal ports, such police stations and revenue offices as in its judgment are necessary to preserve order in the region of the canal, and for the observance of the fiscal laws of the Republic. All expenses incident to this service, including those of buildings, endowments, salaries and allowances of employes, and transportation of the forces, shall be paid to the Government by the company on such terms and conditions as may be established, taking into consideration the requirements and necessities of such service. The company, however, shall have the power to establish guards and watchmen for the service of the canal and the enforcement of its regulations.

ARTICLE XXXVIII.

Contracts for labor on the canal shall enjoy the privileges which the laws of the country accord to agricultural contracts, provided they be clothed with the formalities that the laws require in such contracts. And the contracts in regard to canal labor that the company execute in foreign countries shall be valid and lawful in Nicaragua during the term stipulated in them, provided they do not violate the laws of the Republic; provided also the documents containing them be presented to the proper authorities, with due authentication, that they may be registered.

ARTICLE XXXIX.

The company shall be exempt during the period of this concession, in peace and in war, from all manner of taxes upon the real property it may acquire by virtue of this contract, and from every kind of direct contributions, local taxes, or any other tax relating to the property and use of the canal, its buildings, and constructions appertaining thereto, in its entire length, including those that are situated in the ports and maritime establishments on the two oceans, as also the lands conceded to the company for the whole term of the privilege. This franchise is not assignable to those who buy the real estate which the company may dispose of by virtue of this concession.

ARTICLE XL.

The Republic of Nicaragua shall not establish any tonnage, anchorage, pilot, lighthouse dues or charges of any kind whatsoever upon vessels of whatever class, or upon the merchandise, baggage, and passengers which may pass through the canal from one ocean to the other, all such dues being reserved for the benefit of the company, as hereinafter set forth in article 43.

But all such merchandise as shall be loaded or discharged at any point of the canal intended for sale shall pay the import and export duties fixed by the revenue laws of the State.

ARTICLE XLI.

With the view of securing the most ample freedom in the transit of persons and property, and in order to remove as far as possible occasions for disagreeable questions, there shall be on each side of the canal a free zone, the extent of which shall be one hundred yards measured from the water's edge in the canal, it being understood that the borders of the lake shall not be considered as margin of the canal for the purposes of this stipulation.

All traffic declared illegal by the laws of the Republic shall be prohibited within the said zone, and the revenue authorities charged with watching and preventing smuggling shall act in conformity with the stipulations in article 32.

It is expressly agreed that every vessel that passes through the canal shall carry on board an officer named by the Government when the authorities think it necessary, and this employe shall act in conformity with the law in case he discovers its infringement.

The two ports to be constructed for the entrance and exit of the canal on the two oceans shall be declared free ports, and they shall be recognized as such from the beginning of the work to the termination of this concession.

The Government in agreement with the company shall establish, by special decree, the limits of the freedom of these ports, which limits shall not extend beyond the waters of the port, which are those included between the mouth of the canal and the entrance to the said ports.

ARTICLE XLII.

For the proper administration of the canal and its appurtenances, and in order to facilitate its construction and operation, the company shall establish the necessary regulations, which shall be binding on all persons found in its waters or its appurtenances, the sole reservation being that the rights and sovereignty of the State be respected.

Annex 26

CLEVELAND AWARD UPON THE VALIDITY OF THE TREATY OF LIMITS OF 1858 BETWEEN COSTA RICA AND NICARAGUA, WASHINGTON, D.C., SPANISH VERSION OF AWARD, SECOND ARTICLE AND THIRD ARTICLE, POINT 5, 22 MARCH 1888

SOURCE: SPANISH VERSION: *MEMORIA ANUAL DE LA SECRETARÍA DE RELACIONES EXTERIORES Y CARTERAS ANEXAS, 1888* (SAN JOSÉ: IMPRENTA NACIONAL, 1888)

GROVER CLEVELAND,

PRESIDENTE DE LOS ESTADOS UNIDOS DE AMÉRICA.

A quienes concierna, Salud:

Habiéndose conferido al Presidente de los Estados Unidos, por virtud del Tratado firmado en Guatemala en veinticuatro de diciembre de mil ochocientos ochenta y seis, entre las Repúblicas de Costa Rica y Nicaragua, la función de decidir como Arbitrador la cuestión pendiente entre los dos Gobiernos contratantes, con respecto á la validez del Tratado de límites celebrado entre ellos el quince de abril de mil ochocientos cincuenta y ocho, estipulándose además en dicho Tratado que si la decisión del Arbitrador fuese en el sentido de que el Tratado es válido, la misma decisión habrá de resolver si Costa Rica tiene el derecho de navegación en el río San Juan, con buques de guerra, ó embarcaciones fiscales, y fallar además, y en el mismo caso, sobre todos los puntos de interpretación dudosa, que cualquiera de las dos partes pudiera encontrar en el Tratado, y comunicara á la otra dentro de treinta días después del canje de las ratificaciones de dicho Tratado de veinticuatro de diciembre de mil ochocientos ochenta y seis.

Y habiendo la República de Nicaragua comunicado debidamente á la República de Costa Rica once puntos que encontró de dudosa interpretación en dicho Tratado de límites de quince de abril de mil ochocientos cincuenta y ocho; y no habiendo la República de Costa Rica comunicado á la República de Nicaragua ningún punto de interpretación dudosa que encontrara en el dicho Tratado.

Y habiendo las dos partes presentado en debida forma ante el Arbitrador sus alegatos y documentos, y después sus respectivas réplicas al alegato de la otra parte, según se provee en el Tratado de veinticuatro de diciembre de mil ochocientos ochenta y seis.

Y habiendo el Arbitrador, en cumplimiento de la cláusula quinta del Tratado últimamente mencionado, delegado sus poderes en el Honorable George L. Rives, Subsecretario de Estado, quien después de haber examinado y estudiado los referidos alegatos, documentos y réplicas, sometió por escrito su informe al referido Arbitrador;

YO, GROVER CLEVELAND, Presidente de los Estados Unidos de América, pronuncio la siguiente decisión y fallo:

Primero.—El antedicho Tratado de límites, firmado el quince de abril de mil ochocientos cincuenta y ocho, es válido.

Segundo.—La República de Costa Rica, no tiene según dicho Tratado, y conforme á las estipulaciones de su artículo sexto, el derecho de navegar el río San Juan con buques de guerra; pero puede hacerlo con embarcaciones del servicio fiscal, según corresponda y tenga que ver con el goce de los "objetos de comercio", que se le reconoce por dicho artículo, ó como se necesite para la protección de dicho goce.

Tercero.—Con respecto á los puntos de dudosa interpretación comunicados, como antes queda dicho, por la República de Nicaragua, decido lo siguiente:

1.—La línea divisoria entre las Repúblicas de Costa Rica y Nicaragua, del lado del Atlántico, empieza en la extremidad de Punta de Castilla, en la boca del río San Juan de Nicaragua, tales como ambas cosas existían el día quince de abril de mil ochocientos cincuenta y ocho. El dominio de toda accesión á dicha Punta de Castilla ha de regirse por las leyes aplicables á ese asunto.

2.—El punto céntrico de la Bahía de Salinas, ha de fijarse, trazando una línea recta, que cierre la boca de la Bahía y determinando matemáticamente el centro de la figura geométrica que resulte circunscrita por dicha línea recta y la orilla de la Bahía en la baja marea.

3.—Debe entenderse por punto céntrico de la Bahía de Salinas el centro de la figura geométrica formada como queda dicho. El límite de la Bahía hacia el Océano es una línea recta tirada desde la extremidad de Punta Arranca Barba, yendo casi directamente hacia el Sur, hasta la parte más Occidental de la tierra inmediata á Punta Sacate.

4.—La República de Costa Rica no está obligada á concurrir con la República de Nicaragua á los gastos necesarios para impedir que se obstruya la Bahía de San Juan del Norte, ó para mantener libre y desembarazada la navegación del río ó del puerto, ó mejorarla en beneficio común.

5.—La República de Costa Rica no está obligada á contribuir en proporción alguna á los gastos que la República de Nicaragua tenga que hacer para cualquiera de los objetos arriba mencionados.

6.—La República de Costa Rica no puede impedir á la República de Nicaragua que ejecute á su costa y dentro de su propio territorio las referidas obras de mejora, *con tal que* las dichas obras no ocasionen la ocupación ó anegamiento, ó perjuicio del territorio costarricense, ó la destrucción ó daño serio de la navegación de dicho río ó de cualquiera de sus brazos, en cualquier punto en que Costa Rica tiene derecho á navegarlos. —La República de Costa Rica tiene el derecho de exigir indemnización por los lugares pertenecientes á ella, en la margen derecha del río San Juan, que se ocupen sin su consentimiento, y por las tierras en la misma orilla que sean inundadas ó perjudicadas de cualquiera otra manera á consecuencia de las obras de mejoramiento.

7.—El brazo del río San Juan conocido con el nombre de "Río Colorado" no debe considerarse como límite entre las Repúblicas de Costa Rica y Nicaragua en ninguna parte de su curso.

8.—El derecho de la República de Costa Rica á la navegación del río San Juan con buques de guerra ó embarcaciones fiscales, está determinado y definido en el artículo segundo de este laudo.

9.—La República de Costa Rica puede negar á la República de Nicaragua el derecho de desviar las aguas del río San Juan, en caso de que dicha desviación ocasione la destrucción, ó serio daño de la navegación de dicho río ó de cualquiera de sus brazos, en cualquier punto en que Costa Rica tiene derecho a navegarlos.

10.—La República de Nicaragua queda obligada á no hacer concesiones para objetos de canal al través de su territorio, sin pedir primero la opinión de la República de Costa Rica, según determina el artículo VIII del Tratado de límites de quince de abril de mil ochocientos cincuenta y ocho. Los derechos naturales de la República de Costa Rica, á que alude dicha estipulación, son los derechos que en virtud de los límites fijados por dicho Tratado posee ella sobre el suelo que se reconoce perpetecerle exclusivamente; los que ella posee en los puertos de San Juan del Norte y Bahía de Salinas, y los que también posee en toda aquella parte del río San Juan que queda á más de tres millas inglesas abajo del Castillo Viejo, empezando la medida desde las fortificaciones exteriores de aquel Castillo, según existían en el año de 1858; y tal vez otros derechos que aquí no se especifican particularmente. Estos derechos deben considerarse dañados en todos los casos en que se ocupe ó inunde el territorio perteneciente á la República de Costa Rica, ó donde se haga algo perjudicial á Costa Rica en cualquiera de los dos puertos antedichos, ó donde se verifique tal obstrucción ó desviamiento del río San Juan que destruya ó impida seriamente la navegación del mismo ó de cualquiera de sus brazos en cualquier punto donde Costa Rica tiene derecho á navegarlos.

11.—El Tratado de límites de quince de abril de mil ochocientos cincuenta y ocho no da á la República de Costa Rica el derecho de ser parte en las concesiones para canal interoceánico que haga Nicaragua; aunque en los casos en que la construcción del Canal envuelva perjuicio á los derechos naturales de Costa Rica, su parecer ó dictamen tenga que ser, según menciona el artículo VIII del Tratado, más que simple voto consultivo. Parece que en tales casos su consentimiento es necesario; y que ella puede por lo tanto exigir compensación por las concesiones que se le pida que otorgue; pero ella no puede exigir como un derecho suyo la participación en las ganancias que la República de Nicaragua se reserve para sí misma en compensación de los favores y privilegios que ésta á su vez conceda.

En testimonio de lo cual así lo firmo y sello con el sello de los Estados Unidos, aquí estampado.

Hecho por triplicado en la ciudad de Wáshington, el veintidós de marzo de mil ochocientos ochenta y ocho, el ciento doce de la independencia de los Estados Unidos.

GROVER CLEVELAND.

Por el Presidente.

T. F. BAYARD,

Secretario de Estado.

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Annex 27

CONTRACT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA AND THE NICARAGUA CANAL ASSOCIATION FOR THE OPENING OF AN INTER-OCEANIC CANAL (PÉREZ-MENOCAL). SAN JOSÉ, PREAMBLE, ARTICLES VI, VII, XXVI, XXXVI, XXXVII, XXXIX, XL, AND XLV, 31 JULY 1888

SOURCES : ENGLISH VERSION : A. R. COLQUHOUN,
THE KEY OF THE PACIFIC : THE NICARAGUA CANAL
(WESTMINSTER : ARCHIBALD CONSTABLE
AND COMPANY, 1895), PP. 386-389, 396-397, 399-404.
SPANISH VERSION : ARCHIVO NACIONAL DE COSTA RICA

The Key of the Pacific

The Nicaragua Canal

BY

ARCHIBALD ROSS COLQUHOUN

ASSOC. MEMBER INST. C.E., F.R.G.S., ETC.; GOLD MEDALLIST
R.G.S.; FIRST ADMINISTRATOR OF MASHONALAND, AND
FORMERLY DEPUTY COMMISSIONER, BURMAH

Formerly Special Correspondent of "The Times" in the Far East and
South Africa, and lately in Central America

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WITH NUMEROUS ILLUSTRATIONS,
PLANS AND MAPS

WESTMINSTER
ARCHIBALD CONSTABLE AND COMPANY
Publishers to the India Office
1895

APPENDIX V.

CONCESSIONS AND DECREES OF THE REPUBLIC OF COSTA RICA TO THE NICARAGUA CANAL ASSOCIATION.

THE CONSTITUTIONAL CONGRESS OF THE REPUBLIC OF COSTA RICA, IN THE EXERCISE OF THE POWERS GRANTED TO IT BY SECTION 4, ARTICLE 73 OF THE CONSTITUTION.

ARTICLE FIRST.

DECREES.

The contract entered into on the 21st of July last, between the Honourable Minister of Public Works, authorized for this purpose by the Honourable President of the Republic, on behalf of the Government of the same, and Mr. Aniceto G. Menocal on behalf of the Nicaragua Canal Association, for excavating and operating an interoceanic canal, crossing, either in whole or in part, through the territory of the Republic, or running along the whole or part of its boundary with Nicaragua, is hereby approved.

The aforesaid contract with the modifications agreed to by Congress reads literally as follows:

The undersigned, PEDRO PEREZ ZELEDON, *Secretary of State for the Bureau of Public Works, especially authorised by the Honourable General, President of the Republic, to celebrate ad referendum the present contract, party of the first part, and* ANICETO G. MENOCAL, *representing the Nicaragua Canal Association, with full powers from it, and also authorized for this purpose by the Executive Committee of the said Association, party of the second part, have revised the contract for the canal made in Washington on the 17th of last May, by the party hereto of* *the first part, in his capacity as Envoy Extraordinary and Minister Plenipotentiary of the Republic of Costa Rica, to the Government of the United States of America, and* MR. HIRAM HITCHCOCK, *President of the aforesaid association; the said contract with the modifications now agreed to by the undersigned, reads of follows:*

ARTICLE I.

The Republic of Costa Rica grants to the NICARAGUA CANAL ASSOCIATION, its successors and assigns, the exclusive privilege to excavate and operate a maritime canal between the Atlantic and the Pacific Oceans, running either wholly or in part through the territory of the said Republic or along the whole, or a part of her border line with the Republic of Nicaragua.

To render this contract fully efficient between the contracting parties hereto, it will be sufficient if the association aforesaid should use or occupy for the works of the said canal, or for any of its ports in one or the other oceans, any Costa Rican waters or at least waters in which Costa Rica has joint ownership or has rights of use and navigation.

Whenever the word "ASSOCIATION" is used in this present document reference is made to the "NICARAGUA CANAL ASSOCIATION," its successors and assigns.

ARTICLE II.

The canal shall be of sufficient dimensions for the free and commodious passage of vessels of the same size as the large steamers used for ocean navigation between Europe and America.

ARTICLE III.

The State declares this work to be one of public utility.

ARTICLE IV.

The duration of the present privilege shall be for ninety-nine years, to be counted from the day on which the canal shall be opened to universal traffic.

During the aforesaid period the association shall have the right to construct and operate within the territory of Costa Rica, a railroad along the whole extent of the said canal, or those parts of the same which it may consider convenient for the better service and operation of the said work.

The Republic binds itself not to make any subsequent concessions for the opening of a canal between the two oceans as long as the present privilege lasts.

The Republic will also abstain during the same period, from granting, within a zone of twenty-five miles along the canal, concessions for railroads from sea to sea, that might compete with the canal in the traffic between foreign nations. This restriction shall not prevent the construction of new railroads that may be convenient for Costa Rica to build to the canal, or to any point on the northern frontier of the Republic, either connecting or not with any other railroads.

ARTICLE V.

The grantee association shall have the right to establish such telegraph lines as may be considered necessary for the construction, management and operation of the canal.

The government shall have the right to use the telegraph lines of the company from any station to any station that may be included within the line from sea to sea, without being obliged to pay the company for such service.

ARTICLE VI.

The Government of the Republic declares and accepts that the ports at each extremity of the canal and the canal itself from sea to sea, during the time of this concession, shall be neutral; and consequently in case of war between other nations, or between one or more nations and Costa Rica, the transit through the canal shall not be interrupted for such cause, and the merchant vessels and individuals of all nations of the world may freely enter the aforesaid ports or pass through the canal without molestation or detention.

In general, all vessels shall freely pass through the canal without distinction, exclusion or preference, whether of persons or nationalities, provided that they pay the dues and comply with the rules established by the association for the use of the said canal and its dependencies.

The transit of foreign troops and vessels of war shall be regulated by such provisions in regard thereto as are now or may be hereafter established in the treaties between Costa Rica and other powers, or by international law. But the entrance of the canal shall be strictly forbidden to vessels of war of any nation which may be at war with Costa Rica, or with any other of the republics of Central America.

Costa Rica shall endeavour to obtain from the powers that are to guarantee the neutrality, that in the treaties to be made for that purpose, they shall also bind themselves to guarantee the same conditions to a zone of land parallel to the canal, and also to a maritime zone in both oceans, the dimensions of which shall be fixed by such treaties.

ARTICLE VII.

The present concession shall be transferable only to such company or companies as may be organized for the purpose of constructing or operating the canal, and in no case to foreign governments or to foreign public powers.

Nor shall the association have the right to transfer to any foreign government or public power any part of the lands granted to it by this contract. But it shall have the right to make such transfers to private parties under the same restrictions.

The Republic of Costa Rica shall not *transfer* its rights and privileges in this respect to the canal to any foreign government or public power.

The people of all nations shall be invited to contribute the necessary capital to the enterprise, and it shall be sufficient for the fulfilment of this requirement to publish an advertisement for twenty consecutive days in one of the principal daily papers of each of the cities, New York, London, and Paris.

ARTICLE VIII.

The capital stock (*capital social*) of the final company which is to operate the canal shall consist of shares of the face value of one hundred dollars each, which shall be issued in such amounts as may be deemed necessary. The issue and transfer both of these shares and of all the bonds and obligations that the company may issue shall be exempt from stamp dues and from all other taxes or imposts now established or to be hereafter established in the Republic.

A five per centum, at least, of the capital stock with which the said company may be organized shall be reserved for such Central American Governments and citizens as may wish to subscribe.

As soon as the said company is ready to open subscription books, notice shall be given by it to the Governments of Costa Rica and Nicaragua, which shall invite the other governments of Central America, and through them private parties, to subscribe.

The shares which, within six months to be counted from the date of the notice given to the government of the opening of the subscription books, are not paid for shall remain at the free disposition of the company.

the two oceans, by using materials resulting from the excavation of the canal, shall belong in fee simple to the association; but the government shall have the right to occupy them in whole or in part after compensation made. Should any port of the canal be within the territory of Costa Rica the association shall not obstruct such port nor widen its beaches unless there is absolute necessity to do so, and in this case the embankments and fillings that it may be necessary to construct in front of said port, shall belong to the Republic.

In general the association shall have the right to use all the lakes and rivers of Costa Rica, the waters of which may be necessary in the judgment of the engineers of the association to construct and feed the canal and to maintain its operations, but this right shall have the following restrictions, to wit:

1st. The navigation of the Costa Rican rivers, which the association may dam or otherwise use for the benefit of the canal shall remain at the termination of the respective works in as good condition as it was before they were made.

2nd. In the places where the waters of said rivers may overflow in consequence of the erection of dams or other artificial obstructions made by the association, the said association shall be obliged to do whatever may be practicable to prevent the formation of swamps and marshes.

3rd. Such damages as may be caused to private parties in consequence of the deviation or elevation of the streams shall be compensated for by the association according to appraisals made by experts in conformity with the laws of the Republic, but the association shall not be obliged to pay more than the State would under similar circumstances.

Article XXVI.

The association cannot import merchandise into the territory of the Republic for the purposes of trafficking with it without paying the custom duties established by law, but it shall have the right to import free from custom duties and of any other imposts whatsoever, the articles needed for the works of the enterprise, its surveys, explorations, examination of localities, constructions, use, operation, maintenance, repairs and improvements of the canal, and also for the telegraphic and railroad service of the same, and for the works and workshops of the company, and the said articles may consist of implements, machinery, apparatus, coal, limestone of all classes, lime, iron and other metals, whether raw or manufactured, mining powder, dynamite or any other analogous substance. These articles may be transported between whatever points they may be needed during the work of the construction of the canal, and shall be landed and stored free from all local taxes.

The association shall also have the right to import free from duties or imposts during the work of constructing the canal, such provisions, clothing for the workmen, and medicines as may be absolutely necessary for its own consumption.

Those articles the commerce of which is not free are excepted from the privileges granted in this Article, and shall remain subject, with the exception of gunpowder, dynamite and other explosives, to such requisites and duties as are established by law.

ARTICLE XXVII.

The vessels that the association may employ as tugboats or for the service of the canal shall be free from all imposts or taxes of any kind whatever, and also the material to be used for their repair and the fuel that they may consume.

The vessels and their appurtenances from whatever place they may come for the service of the association shall be exempt from all duties and imposts.

ARTICLE XXVIII.

The government shall enact such regulations as it may deem necessary to prevent smuggling, and for the preservation of public order in the region of the canal lying within the territory of Costa Rica or bordering on it, and in the waters where it may exert joint jurisdiction. The company shall be bound to lend its assistance for the enforcement of such regulations. But in the free zone along the margin of the canal, as hereinafter provided, measures for the prevention of smuggling shall be limited to vigilance on the part of the employé or employés whom it may concern, without right to any further measures either against passengers, vessels or their cargoes excepting when an attempt at smuggling may be discovered; it being the intention of the State that there shall be most ample freedom of transit through the canal for persons and property with the sole limitations established by this contract. Consequently the association shall have the right to unload and reload ships in transit at such points as may be necessary in order to make repairs or lighten the vessels or shift their cargoes, or on account of any accident that unavoidably may render it necessary, without being subject thereby to search, exactions or contributions of any kind, provided in each case, and before beginning operations, notice is given to the nearest custom house authority.

waters appertaining to it in ownership or joint jurisdiction such police stations and revenue offices as in its judgment may be necessary for the preservation of order in the region of the canal and for the observance of the fiscal laws of the Republic.

The expenses incident to said services including those of buildings, salaries, wages, and allowances of the employés and transportation of the forces and which may be in excess of such as are now borne by the Government for the Custom House actually established at the mouth of the San Carlos, or on any other point that may be crossed by the canal, shall be paid to the Public Treasury by the company on such terms and conditions as may be established hereafter, taking into consideration the requirements and necessities of such services.

The association shall also have the right to establish guards and watchmen for the service of the canal and the enforcement of its regulations.

ARTICLE XXXIV.

All contracts in regard to the works of the canal that the association may enter into in foreign countries shall be valid and effective, and shall have full force and effect in Costa Rica, provided they do not violate the laws of the Republic.

ARTICLE XXXV.

The association shall be exempt during the period of this concession, both in time of peace and in time of war, from all kinds of taxes upon the real estate that it may acquire by virtue of this contract, and from all kinds of direct taxes, local charges, or any other imposts relating to the property and use of the canal, or of its buildings and the construction and dependencies thereof, all along its extent, including those situated in the ports and maritime establishments on the two oceans.

This franchise is not transferable to the purchasers of the real estate which the association may alienate under this grant.

ARTICLE XXXVI.

The Republic of Costa Rica shall not establish any tonnage, anchorage, pilot or lighthouse dues, or any other charges of any kind whatsoever, upon vessels of any class whatever, or upon the merchandise, baggage and passengers which may pass through the canal from one ocean to the other; all such dues are reserved for the benefit of the association, as provided in Article 39.

ARTICLE XXXVII.

For the purpose of securing the most ample liberty or the transit of persons and property, a free zone shall be established on each side of the canal, and the width thereof shall be 90 metres and 288 millimetres, measured from the water's edge in the canal.

All traffic declared illegal by the laws of the Republic shall, however, be prohibited within the said zone, and the revenue authorities whose duty it is to watch for and prevent smuggling, shall act in conformity with the stipulations of Article 28.

It is expressly agreed that every vessel that may pass through the part of the canal which may be within the territory of Costa Rica, or along its borders or in waters over which it exerts co-jurisdiction, shall carry on board an officer appointed by the government whenever the authorities may deem it convenient, and that officer shall act in conformity with the law should he discover that it is being violated.

The two ports to be constructed for the entrance and exit of the canal on both oceans, which may be wholly or in part within the territory or in waters of Costa Rica, shall be declared free ports, and shall be recognized as such from the opening of the canal to the end of this concession.

The government, in agreement with the company, shall establish, by means of a special decree, the limits of this franchise, which shall never extend beyond the waters of the ports comprised between the mouth of the canal and the entrance of said ports.

All merchandise that shall be loaded or discharged at any point of the canal within the territory of Costa Rica, and intended for internal commerce, shall pay the import and export duties fixed by the revenue laws of the State.

ARTICLE XXXVIII.

For the proper administration of the canal and its dependencies, and in order to facilitate its construction and operation, the association shall establish the proper regulations, which shall be binding upon every person who may be found in its waters or in its dependencies; the sole reservation being that the rights and sovereignty of the State be respected.

It is understood that the association, in the exercise of the powers conferred by this Article, shall not make other regulations than those necessary for the administration and particular management of the canal; and that, before carrying them into effect, they shall be submitted for the approval of the government. The State shall lend the aid of its authority to enforce these regulations.

ARTICLE XXXIX.

By way of compensation for the expenses incurred in the surveys, construction, maintenance and operation of the canal, or any part thereof, during the period of said privilege, the said association shall have the right to establish and collect for the passage of all kinds of ships, vessels, travellers and merchandise through the canal, and in the waters and ports pertaining to it, such dues of navigation, tonnage, pilotage, towage, stowage, lay days, anchorage, light, roadsteads, wharfage, hospital dues and any other similar charges, in conformity with the tariffs to be established by it in accordance with Article 45 of this contract.

These tariffs may be modified by the association at any time on condition that all modifications that may be introduced in it shall be previously communicated to the government, which, in case of finding them within the limits established by said Article 45, shall cause them to be complied with as if they were regulations enacted by itself.

The payment of all the tariff dues shall be exacted without any exception or preference, and under identical conditions, from all vessels, whatever be the place they come from or their nationality, with the exception stipulated in the following Article.

ARTICLE XL.

In compensation for the privileges and concessions that Costa Rica grants by this contract, it is hereby stipulated that the Republic shall enjoy the special privilege that Costa Rican vessels, navigating under the flag of Costa Rica, shall be entitled to navigate the canal at a reduction of fifty per centum of the general tariff while engaged in the coasting trade, or in the reciprocal trade with the other Republics of Central America.

To enjoy this privilege, the said vessels shall be necessarily of the register of the Republic, and belong to citizens of the same.

A reduction of fifty per centum of the general tariff is also granted to all vessels that begin their voyage for a foreign country at any of the ports belonging to the Republic, with a cargo wholly consisting of products of the country.

Costa Rican vessels of war and revenue cutters shall pay no dues in passing through the canal. No dues shall be paid by the vessels of the National Register navigating either Costa Rican waters connected with the canal or the canal itself, without passing out of the locks, but said vessels are not in any way to obstruct the free navigation of the canal.

Costa Rica, on its part, shall not object to the enjoyment by Nicaraguan ships of the advantage granted in this Article to those of Costa Rica, provided that Nicaragua, on its part, consents that the ships of Costa Rica shall enjoy in Nicaraguan waters the said privilege.

All the concessions to which this Article refers shall be extended to the other Republics of Central America, or any of them, whenever Costa Rica and Nicaragua shall find themselves free from international obligations which may prevent it, or whenever one or more of said Republics shall form a single nation with Costa Rica.

ARTICLE XLI.

In case it may be possible to utilize the waters of the canal and its dependencies for the irrigation of plantations, gardens and streets, or for the supply of towns that may be without it, or as motive power for private enterprises, the company shall have the power to supply it, collecting dues in proportion to the amount furnished, according to the tariff that it may establish in agreement with the government.

ARTICLE XLII.

The association shall undertake at its expense the final surveys of the ground and the location of the line of the canal by a commission of competent engineers. The Government of Costa Rica shall have the right of visiting and inspecting the final surveys which are in progress, and those already completed by an engineer appointed by said government, and whose salary shall be paid by the association, the amount thereof to be fixed hereafter by special agreement between the government and the company.

A period of two years and a half to be counted from the date of the ratification of the contract is granted the association for the final surveys of the canal, and within the said time the association shall have to make the said final surveys, organize the company, which is to carry on the work, and begin the work of construction.

The work of construction shall be understood to have commenced if within three years after its inception two millions of dollars have been expended on it.

The period herein provided for shall admit of extension by the Republic at the request of the association, and upon grounds of justice, in the judgment of the government.

ARTICLE XLIII.

A term of ten years is also granted to the association for the construction, completion and opening to traffic the canal for maritime navigation. However, should events of main force arise duly justified, and sufficient to impede the regular progress of the works during the period of the said ten years, an extension shall be granted equal in duration to the time that may have been lost by such delays.

If at the expiration of the ten years aforesaid the works should not be completed, so as to have the maritime communication between the two oceans opened, in consideration of the great capital the company may have invested in the enterprise, and the good will and ability it may have shown, and the difficulties encountered, the Republic binds itself to grant a new extension.

ARTICLE XLIV.

As a guaranty of the fulfilment of the obligations which the final company which is to construct the canal incurs in accordance with Article 42, it shall deposit to the order of the Government of Costa Rica, in a bank or in a mercantile house in this city, or with an agent which the government may designate immediately after the certificates are issued, one thousand shares of its capital stock of the nominal value of $100 each. The said one thousand shares of capital stock shall be considered an advance to the government of the payment of the police and revenue expenses to be made under Article 33, and the association shall be credited with the actual value of said shares at the time such payments are made.

ARTICLE XLV.

In consideration of the valuable privileges, franchises and concessions granted by virtue of this contract to the association, the Republic shall receive in shares, certificates or other values representing the capital stock of the final company, an amount equal to one and one half per centum of the total amount of the issue of said capital stock in shares or certificates of $100 each. This sum shall in no event be less than $1,500,000. Said shares shall be considered as fully paid up, and two-thirds thereof shall not be transferable. All these shares shall participate in the benefits, interests, distributions, dividends, amortizations, rights, privileges, and all other advantages granted to paid-up shares without any difference whatever. These shares together with the other privileges herein granted by the association to the government shall be in full compensation to the Republic for all public unappropriated lands that may be flooded and for all the privileges, and concessions conferred by this contract, and shall cover completely all claims of this description on the part of the State against the association or the final company. The shares to which this Article refers shall be delivered to the agent appointed by the government for this purpose as soon as the company may be ready to issue certificates of its capital.

ARTICLE XLVI.

From the earnings of the enterprise the company shall take, in the first place, the necessary amount to cover all the expenses for maintenance, operation and administration; all the sums necessary to secure the interest, which shall not exceed six per centum, and the amortization of the obligations and of the shares, and what remains shall form the net profits, of which at least eighty per centum (80 per cent.) shall be divided among the shareholders, it being understood that after the lapse of ten years after the completion of the canal the company shall in no case divide among the shareholders in payment of dividends, directly or indirectly, by issue of shares or otherwise, more than fifteen per centum (15 per cent.) annually or in this proportion, from dues collected from the aforesaid canal and where it shall appear that these dues yield a greater profit, they shall be reduced to the fixed limit of fifteen per cent. per annum.

ARTICLE XLVII.

The present concession shall be forfeited:

1st. Through the failure on the part of the company to comply with any one of the conditions contained in Articles 7, 42, and 43.

2nd. If the service of the canal, after it is completed, is interrupted for six months, unless in case of unforeseen accidents or main force.

When the concession shall have been declared forfeited from whichever of these causes, the public lands granted by virtue of the present contract shall revert to the Republic in whatever condition they may be, and without compensation, such lands as may have been alienated by the company with the formalities prescribed by law, shall be excepted, provided that such alienations shall not have taken place within the six months preceding the date on which the company may have become legally liable to the penalty herein established.

Los infrascritos Pedro Pérez Zeledón, *Secretario de Estado en el Despacho de Fomento, autorizado especialmente por el Benemérito General Presidente de la República para celebrar ad-referendum el presente contrato,—por una parte,—y* Aniceto G. Menocal, *Representante de la Asociación del Canal de Nicaragua, con poder bastante de ella y autorizado también para el dicho objeto por la Comisión Ejecutiva de la misma,—por la otra parte,—han procedido á rever la Contrata de Canal celebrada en Wáshington el día 17 de mayo último, por el primero en su carácter de Enviado Extraordinario y Ministro Plenipotenciario de la República de Costa Rica ante el Gobierno de los Estados Unidos de América, y el señor* Hiram Hitchcock, *Presidente de la expresada Compañía; la cual contrata, con las modificaciones ahora acordadas por los infrascritos, dice así:*

Artículo I.

La República de Costa Rica concede á la Asociación del Canal de Nicaragua, sus sucesores y causa-habientes, el privilegio exclusivo de excavar y explotar un Canal marítimo entre los océanos Atlántico y Pacífico, que cruce en todo ó en parte el territorio de dicha República ó corra á lo largo del todo ó parte de su frontera limítrofe con la República de Nicaragua.

Mientras dure el presente privilegio se compromete la República á no otorgar ninguna concesión ulterior para la apertura de un canal entre los dos océanos.

Se abstendrá tanbién durante el mismo tiempo de otorgar dentro de una zona de veinticinco millas á lo largo del Canal, concesiones para ferrocarriles de mar á mar que puedan hacer competencia al Canal en el tráfico entre naciones extranjeras. Esta restricción no impide la construcción de las nuevas líneas férreas que á Costa Rica pueda convenir construir hasta el Canal ó hasta cualquier punto de la frontera setentrional de la República, ya se enlacen ó no con cualesquiera otros ferrocarriles.

Artículo V.

La Asociación concesionaria tendrá el derecho de establecer las líneas telegráficas que se consideren necesarias para la construcción, manejo y explotación del Canal.

El Gobierno podrá usar las líneas telegráficas de la Empresa desde y para cada una de las estaciones que comprenda la red del uno al otro mar, sin que por tal servicio tenga que hacer remuneración alguna á la Asociación.

Artículo VI.

El Gobierno de la República declara y acepta como neutrales, durante el término de esta concesión, los puertos de uno y otro extremo del Canal, y el Canal mismo de uno á otro mar; y en consecuencia, en caso de guerra entre otras naciones ó entre alguna ó algunas de éstas y Costa Rica, el tránsito por el Canal no se interrumpirá por tal motivo, y los buques mercantes y los individuos de todas las naciones del mundo, podrán entrar libremente por dichos puertos y transitar por el Canal, sin ser molestados ni detenidos.

En general, todos los barcos podrán pasar libremente por el Canal, sin distinción, exclusión, ó preferencia de personas ó nacionalidades, mediante el pago de los derechos y la observancia de los Reglamentos establecidos por la Asociación para el uso de dicho Canal y sus dependencias. En cuanto al tránsito de tropas extranjeras y de buques de guerra, se estará á las prescripciones que sobre el particular se hallen establecidas ó establezcan en los tratados entre Costa Rica y otras naciones ó por el Derecho Internacional. Pero la entrada al Canal queda rigurosamente prohibida á los buques de guerra de cualquiera nación que se halle en guerra con Costa Rica, ó con cualquiera otra de las Repúblicas de Centro América.

Costa Rica procurará obtener de las Potencias que garanticen la neutralidad, el que en las convenciones que se celebren con tal objeto, se comprometan también á garantizar con el mismo carácter una zona de tierra paralela al Canal, y una zona marítima en ambos océanos, cuyas dimensiones se fijarán en los pactos respectivos.

Artículo VII.

La presente concesión sólo será trasmisible á la Compañía ó Compañías que se organicen con el objeto de construir ó explotar el Canal, y en ningún caso á Gobiernos ni á Poderes Públicos extranjeros.

Tampoco podrá la Asociación ceder á ningún Gobierno ó Poder Público extranjero, parte alguna de los terrenos que se le conceden por este contrato; pero sí podrá hacerlo á particulares, con la misma restricción.

La República de Costa Rica no podrá ceder sus derechos y privilegios respecto del Canal, á ningún Gobierno ó Poder Público extranjero.

Se invitará á todas las naciones para la formación del capital necesario á esta Empresa, y con tal objeto será bastante la publicación de un anuncio durante veinte días consecutivos en uno de los principales diarios de cada una de las ciudades de Nueva York, Londres y París.

Artículo XXVI.

La Asociación no podrá introducir en el territorio de la República mercancías con el objeto de traficar con ellas, sino fuere pagando los derechos de Aduana establecidos por la ley; sin embargo, podrá introducir libre de tales derechos y de cualesquiera otros impuestos, los artículos necesarios para los trabajos de la Empresa, sus estudios, exploraciones, reconocimientos, construcciones, uso, explotación, reparación y mejora del Canal, y también para el servicio telegráfico y de ferrocarriles del mismo, y para los trabajos y talleres de la Compañía: consistirán dichos artículos en utensilios, máquinas, aparatos, carbón, piedras de cal de todas clases, cal, hierro y otros metales en bruto ó manufacturados, pólvora para minas, dinamita ó cualquiera otra sustancia análoga. Estos objetos podrán transitar entre cualesquiera puntos donde haya necesidad, durante los trabajos de la construcción del Canal, y descargarse y almacenarse libres de toda contribución local.

La Asociación podrá introducir también libre de derechos ó impuestos, durante los trabajos de apertura del Canal, los víveres, vestidos para los trabajadores y medicamentos, absolutamente necesarios para su propio consumo.

Se exceptúan de la franquicia contenida en este artículo, los objetos que no sean de libre comercio, los cuales quedan sujetos, fuera de la pólvora y dinamita y otras sustancias explosivas, á los requisitos é impuestos señalados por las leyes.

Artículo XXVII.

Los buques que la Asociación emplee como remol-

La Asociación tendrá derecho, al propio tiempo, de establecer guardianes y celadores para el servicio del Canal y la observancia de sus reglamentos.

ARTÍCULO XXXIV.

Todos los contratos para trabajos del Canal, que la Asociación celebrare en naciones extranjeras, serán válidos y subsistentes y tendrán pleno vigor y efecto en Costa Rica, en cuanto no contraríen lo establecido en las leyes de la República.

ARTÍCULO XXXV.

La Asociación quedará exenta durante el término de la concesión, así en tiempo de paz como de guerra, de toda clase de impuestos sobre la propiedad raíz que adquiera en virtud de este contrato, y de toda especie de contribuciones directas, impuestos locales, ó de cualquier otro derecho relativo á la propiedad y al uso del Canal ó sus edificios y las construcciones que de él dependan, en todo su trayecto, incluso las que se hallen situadas en los puertos y establecimientos marítimos en los dos océanos.

Esa franquicia no es trasmisible á los compradores de los bienes raíces que la Asociación pueda enajenar con arreglo á esta concesión.

ARTÍCULO XXXVI.

La República de Costa Rica no establecerá derecho de tonelaje, anclaje, pilotaje, faro, ó ningún otro sobre las embarcaciones de cualquiera clase que sean, ni sobre las mercancías, equipajes y pasajeros, que transiten por el Canal del uno al otro océano, quedando todos estos derechos reservados á beneficio de la Asociación, como se consigna en el artículo trigésimo nono.

ARTÍCULO XXXVII.

A fin de asegurar la más amplia libertad de tránsito para personas y propiedades, habrá en cada margen del Canal una zona libre, cuya extensión será de 90 metros, 288 milímetros, medidos desde el punto hasta donde alcancen las aguas de dicho Canal.

Será prohibido, no obstante, en dicha zona el tráfico declarado ilegal por las leyes de la República, y las autoridades fiscales encargadas de celar y prevenir el contrabando, obrarán según las estipulaciones del artículo vigésimo octavo.

Queda expresamente convenido que todo buque que transite por la parte del Canal que esté dentro del territorio de Costa Rica ó á lo largo de su frontera ó en aguas sobre las cuales ejerza co-soberanía, llevará á su bordo un guarda de nombramiento del Gobierno, cuando la Autoridad lo crea conveniente, y ese empleado obrará conforme á la ley, caso de descubrir que se la infrinje.

Los dos puertos de entrada y salida del Canal en uno y otro océano, que en todo ó en parte se hallen en territorio ó aguas de Costa Rica, serán declarados puertos francos y se reconocerán como tales desde la apertura del Canal hasta el fin de esta concesión.

El Gobierno de acuerdo con la Compañía, señalará por una disposición particular los límites de la franquicia, la cual no deberá exceder nunca de las aguas de los mismos puertos comprendidas entre la desembocadura del Canal y la entrada de éstos.

Las mercancías que se embarquen ó desembarquen en cualquier puerto del Canal dentro del territorio de Costa Rica, destinadas al comercio interior, pagarán los derechos de importación y de exportación, fijados por las leyes fiscales del Estado.

Artículo XXXVIII.

Para la buena administración del Canal y sus dependencias, y para facilitar su construcción y explotación, la Compañía formulará los correspondientes reglamentos, los cuales serán obligatorios para toda persona que se halle en sus aguas ó en sus dependencias, bajo la sola reserva del respeto á los derechos y soberanía del Estado.

Es entendido que la Asociación en uso de las facultades que le concede este artículo, no podrá hacer otros reglamentos que los que exija la administración y particular manejo del Canal, y que antes de ponerlos en ejecución, habrá de someterlos á la aprobación del Gobierno.—El Estado prestará el apoyo de su autoridad para hacer observar estos reglamentos.

Artículo XXXIX.

Por vía de compensación de los gastos de estudios, construcción, conservación y explotación del todo ó parte del Canal, durante el término del privilegio, tendrá la Asociación el derecho de establecer y percibir por el pasaje de los buques y embarcaciones de toda clase, el de viajeros y mercancías á través del Canal y en las aguas y puertos de su dependencia, impuestos de navegación, de tonelaje, pilotaje, remolcaje, bodegaje, estadía, anclaje, faros, radas, muellaje, hospitales y cualesquiera otros semejantes, conforme á las tarifas que se establezcan, concordantes con el artículo cuarenta y cinco de este contrato, Estas tarifas podrán modificarse por la Asociación en todo tiempo, bajo la condición de que todas las modificaciones que en ellas se introduzcan sean previamente comunicadas al Gobierno, quien encontrándolas dentro de los límites establecidos por dicho artículo cuarenta y cinco, las hará cumplir, como si fueran reglamentos emitidos por él mismo.

El pago de todos los derechos de tarifa se exigirá sin excepción ni preferencia alguna, y bajo condiciones idénticas, á todos los buques de cualquier procedencia y nacionalidad, salvo las reservas estipuladas en el artículo siguiente.

Artículo XL.

En compensación de los privilegios y concesiones que Costa Rica otorga por este contrato, queda estipulado que la República gozará del privilegio especial de que los buques costarricenses que naveguen con la bandera de Costa Rica, podrán transitar por el Canal con una reducción de un cincuenta por ciento de la tarifa general, mientras se ocupen en el comercio de cabotaje, ó en el recíproco con las demás Repúblicas de Centro América.

Para gozar de este privilegio dichos buques han de ser precisamente de la matrícula de la República y han de pertenecer á ciudadanos de la misma.

También se concede una rebaja de un cincuenta por ciento de la tarifa general á cualquier buque que comience su navegación con destino al extranjero, en cualquiera de los puertos pertenecientes á la República, y cuyo cargamento se componga en su totalidad de productos del país.

Los buques de guerra costarricenses, lo mismo que los del servicio fiscal de la República no pagarán derecho de tránsito por el Canal. Tampoco pagarán derechos los buques de la matrícula nacional que circulen en aguas costarricenses conexionadas con el Canal, y en este mismo, sin salir de las exclusas; pero dichos buques no podrán en manera alguna estorbar la expedita navegación del Canal.

Por parte de Costa Rica no habrá dificultad para que desde luego los buques nicaragüenses gocen en aguas costarricenses de las ventajas acordadas en este artículo á los de Costa Rica, siempre que por parte de Nicaragua se consienta en reciprocidad que los buques de Costa Rica gocen en aguas nicaragüenses de dichas ventajas.

Todas las concesiones á que se refiere este atículo serán extensivas á las otras Repúblicas de Centro América, ó cualquiera de ellas, si Costa Rica y Nicaragua se hallaren libres de compromisos internacionales que lo impidan, ó cuando alguna ó algunas de dichas Repúblicas formen con Costa Rica una sola nación.

ARTÍTULO XLI

En caso de que sea posible utilizar las aguas del Canal y sus dependencias, para riego de plantaciones, jardines y calles, ó para el abastecimiento de poblaciones que carezcan de ella, ó como fuerza motriz para empresas particulares, la Compañía tendrá facultad de suministrarla, percibiendo, según la tarifa que establezca de acuerdo con el Gobierno, un derecho proporcional á la cantidad que suministre.

ARTÍCULO XLII.

La Asociación emprenderá á su costa los estudios definitivos del terreno y trazado de la línea del Canal, por medio de una comisión de ingenieros competentes. El Gobierno de Costa Rica tendrá el derecho de visitar é inspeccionar los trabajos de estudio definitivo que estén haciéndose y los yá terminados, por medio de un

Artículo XLIV.

En garantía del cumplimiento de lo estipulado en el artíulo cuadragésimo segundo, la Compañía definitiva, depositará á la orden del Gobierno de Costa Rica en un Banco ó casa de comercio de Nueva York ó en el Agente designados por el Gobierno, y tan pronto como sean emitidos los certificados, mil acciones del capital social del valor nominal de cien pesos cada una. Dichas acciones serán consideradas como un adelanto hecho al Gobierno para el pago de los gastos de policía y resguardo, que deben hacerse según el artículo trigèsimo tercero, y se acreditará á la Asociación el valor real de dichas acciones en la época en que se hagan dichos pagos.

Artículo XLV.

En consideración á los valiosos privilegios, franquicias y concesiones que se otorgan á la Asociación, por virtud de este contrato, la República recibirá en acciones, certificados ú otros valores que representen el capital social de la Compañía definitiva, una suma igual al uno y medio por ciento del valor total de la emisión de dicho capital social en acciones ó certificados del valor de cien pesos cada uno: esa suma en ningún caso bajará de un millón y quinientos mil pesos. Las acciones se entenderán pagadas por completo; dos tercios serán intransferibles, y todas ellas participarán de los beneficios, intereses, reparticiones, dividendos, amortizaciones, derechos, privilegios y demás ventajas señaladas á las acciones pagadas, sin diferencia alguna.

Estas acciones junto con los demás privilegios concedidos por la Asociación al Gobierno por este contrato, servirán de plena compensación á la República por todas las tierras baldías que sean innundadas, y por todos los privilegios, concesiones otorgados en este contrato, y cubrirán por completo todas las reclamaciones de esta clase por parte del Estado contra la Asociación ó la Compañía definitiva.

Las acciones á que se refiere este artículo se entregarán al Agente que nombre el Gobierno con este objeto, tan pronto como la Compañía esté lista para emitir los certificados de su capital.

ARTÍCULO XLVI.

De los productos de la Empresa la Compañía tomará en primer lugar lo necesario para cubrir todos los gastos de conservación, explotación y administración; todas las sumas necesarias para asegurar los intereses, que no excederán del seis por ciento, y la amortización de las obligaciones y de las acciones; lo que reste formará el beneficio neto, del cual se dividirá entre los accionistas por lo menos un ochenta por ciento, siendo entendido que después de diez años de la conclusión del Canal, la Compañía no podrá nunca repartir entre los accionistas, por pago de dividendos directa ó indirectamente, por emisión de acciones, ó de otro modo, más de un quince por ciento anual, ó en esa proporción por impuestos colectados en la referida vía; y cuando se descubra que esos impuestos rinden una utilidad mayor se reducirán á la regla fija de quince por ciento al año.

ARTÍCULO XLVII.

La presente concesión caduca:

Primero: por falta de cumplimiento por parte de la Compañía, de cualquiera de las condiciones de los ar-

Annex 28

REPORT REGARDING THE PROVINCE OF COSTA RICA, PRESENTED BY LUIS DIEZ NAVARRO TO THE CAPTAIN GENERAL OF GUATEMALA, 1744

SOURCE: *REVISTA DE LOS ARCHIVOS NACIONALES*,
AÑO III, SEPTIEMBRE Y OCTUBRE DE 1939, NOS. 11 Y 12
(SAN JOSÉ: IMPRENTA NACIONAL, 1939), P. 581.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Report concerning the Province of Costa Rica from Engineer Luis Diez Navarro to the Captain General of Guatemala Tomás de Rivera y Santa Cruz

Year of 1744

On December six of the present and past year seventeen hundred and forty three, I left this Capital to continue my visit of what was left of the Province of Costa Rica…

…Cap. 2- On the nineteenth of January of the present year I arrived at the Mount of Nicaragua, where the Jurisdiction of said Province ends (as I was explained in my first trip) and I entered the Jurisdiction of Nicoya, that although it is a separated Mayoralty, from here it is reputed as the Province of Costa Rica.

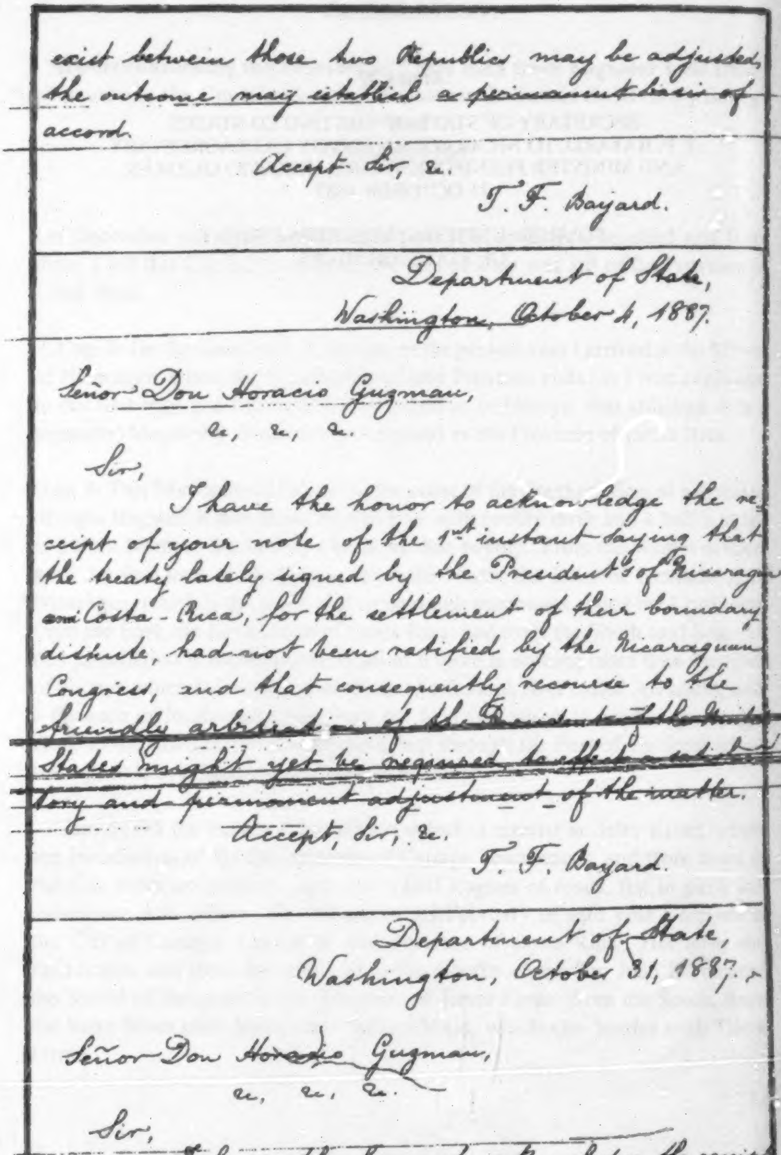
Cap. 3- This Mayoralty is located in the coast of the Southern Sea, at a distance of eight leagues: It runs from West to East with twenty three and a half leagues and from North to South with a bit more than twenty. From the West it borders with the Province of Nicaragua; from the North, the Lake of Granada or of Nicaragua, which is the same, and some rough mountains called the Cordillera: from the East, the Jurisdiction of Costa Rica: and from the South said Sea. All this jurisdiction is unpopulated, in all of it there is nothing more than the town of Nicoya which is located on the bank of a famous river called Alvarado, with a distance of fourteen leagues from the Sea, and which is used to go up and close to the town of Nauios, entering first through the Port of Caldera, which belongs to the Jurisdiction of Costa Rica.

…Cap. 5- On the twenty third of said month, I arrived at Salto River, where the Jurisdiction of the Government of Cartago commences, and from there to the City there are seventy eight and a half leagues of roads, flat in parts and mountainous in others. On the second of February of said year I arrived at the City of Cartago, Capital of said Province of Costa Rica. Her term and jurisdiction are: from the north, from the mouths of the San Juan River until the Shield of Veraguas, at the Kingdom of Tierra Firme: from the South, from the Salto River until Boruca or Chiriqui Viejo, which also bordes with Tierra Firme.

Annex 29

SECRETARY OF STATE OF THE UNITED STATES, T. F. BAYARD, TO NICARAGUAN ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY, HORACIO GUZMÁN, 31 OCTOBER 1887

SOURCE: UNITED STATES DEPARTMENT OF STATE ARCHIVES



exist between those two Republics may be adjusted, the outcome may establish a permanent basis of accord.

Accept Sir, &c.

T. F. Bayard.

Department of State,
Washington, October 4, 1887.

Señor Don Horacio Guzman,
&c, &c, &c.

Sir,

I have the honor to acknowledge the receipt of your note of the 1st instant saying that the treaty lately signed by the Presidents of Nicaragua and Costa-Rica, for the settlement of their boundary dispute, had not been ratified by the Nicaraguan Congress, and that consequently recourse to the friendly arbitration of the President of the United States might yet be required to effect a satisfactory and permanent adjustment of the matter.

Accept, Sir, &c.

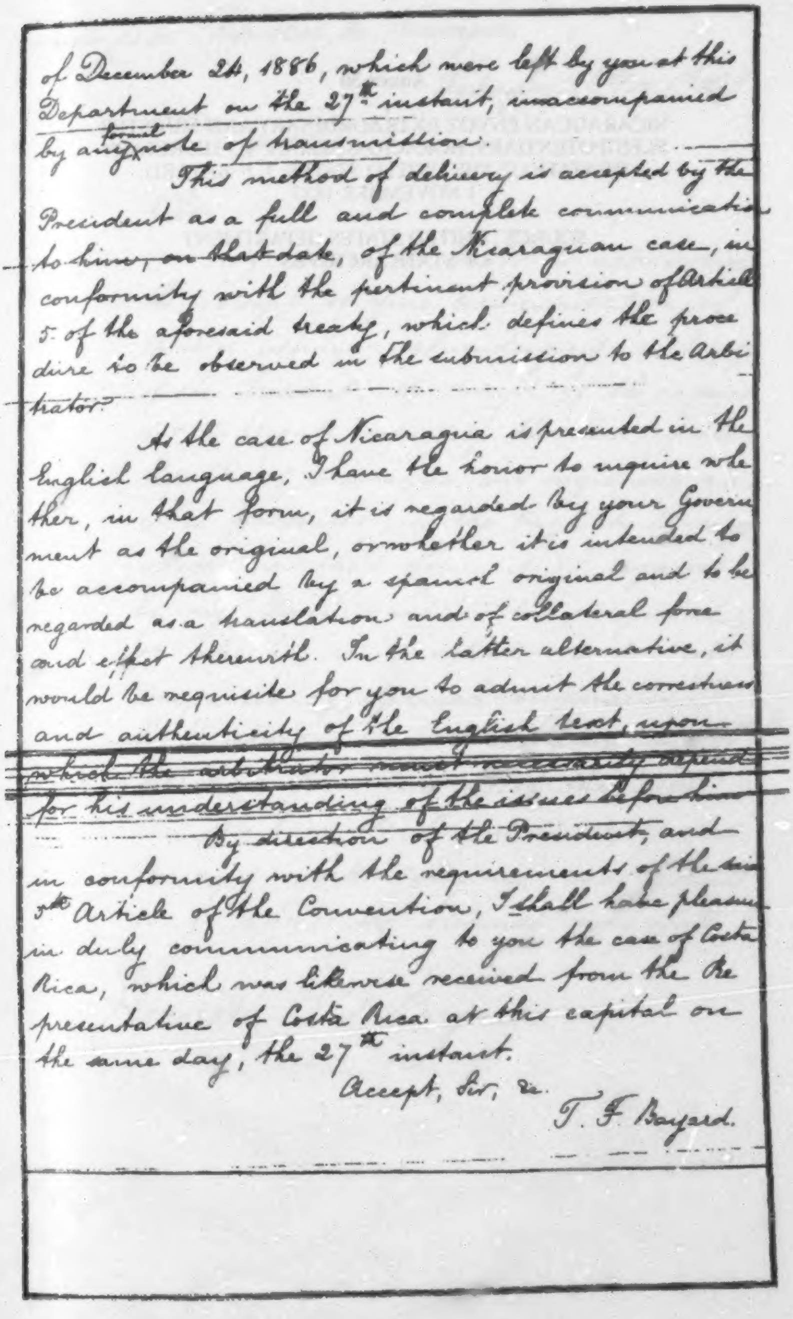
T. F. Bayard.

Department of State,
Washington, October 31, 1887.

Señor Don Horacio Guzman,
&c, &c, &c.

Sir,

I have the honor to acknowledge the receipt of the original and duplicate copies of the case of the Republic of Nicaragua, under the Arbitration Treaty



of December 24, 1886, which were left by you at this Department on the 27th instant, unaccompanied by any formal note of transmittion.

This method of delivery is accepted by the President as a full and complete communication to him, on that date, of the Nicaraguan case, in conformity with the pertinent provision of Article 5 of the aforesaid treaty, which defines the procedure to be observed in the submission to the Arbitrator.

As the case of Nicaragua is presented in the English language, I have the honor to inquire whether, in that form, it is regarded by your Government as the original, or whether it is intended to be accompanied by a Spanish original and to be regarded as a translation and of collateral force and effect therewith. In the latter alternative, it would be requisite for you to admit the correctness and authenticity of the English text, upon which the arbitrator must necessarily depend for his understanding of the issues before him.

By direction of the President, and in conformity with the requirements of the said 5th Article of the Convention, I shall have pleasure in duly communicating to you the case of Costa Rica, which was likewise received from the Representative of Costa Rica at this capital on the same day, the 27th instant.

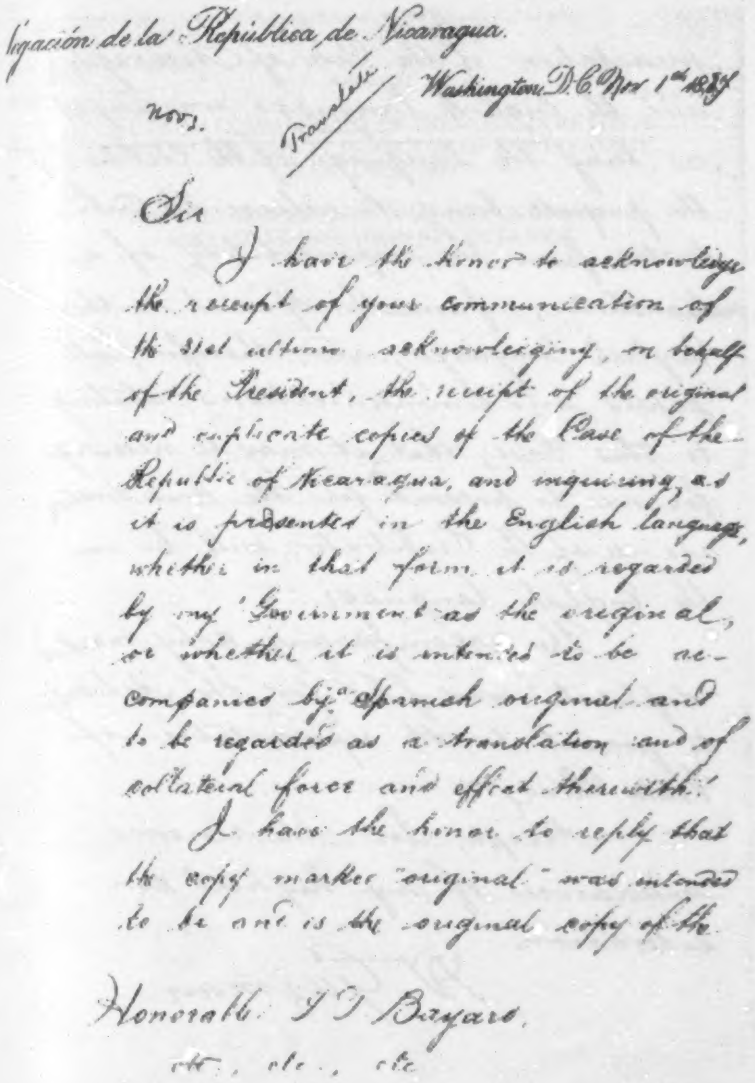
Accept, Sir, &c.

T. F. Bayard.

Annex 30

NICARAGUAN ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY, HORACIO GUZMÁN, TO SECRETARY OF STATE OF THE UNITED STATES, T. F. BAYARD, 1 NOVEMBER 1887

SOURCE: UNITED STATES DEPARTMENT OF STATE ARCHIVES



Legación de la República de Nicaragua.

Translation

Washington D.C. Nov 1st 1887

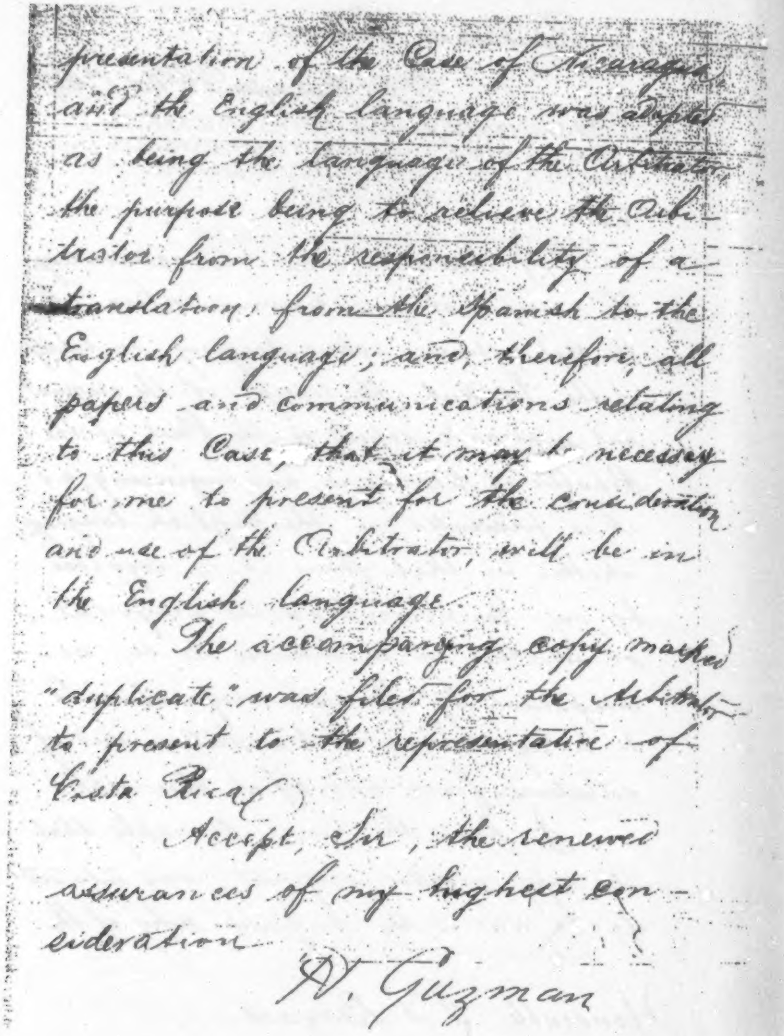
No. 3.

Sir

I have the honor to acknowledge the receipt of your communication of the 31st ultimo acknowledging, on behalf of the President, the receipt of the original and duplicate copies of the Case of the Republic of Nicaragua, and inquiring, as it is presented in the English language, whether in that form it is regarded by my 'Government as the original, or whether it is intended to be accompanied by a Spanish original and to be regarded as a translation and of collateral force and effect therewith.'

I have the honor to reply that the copy marked "original" was intended to be and is the original copy of the

Honorable T. F. Bayard,
etc., etc., etc.



presentation of the Case of Nicaragua and the English language was adopted as being the language of the Arbitrator the purpose being to relieve the Arbitrator from the responsibility of a translation from the Spanish to the English language; and, therefore, all papers and communications relating to this Case, that it may be necessary for me to present for the consideration and use of the Arbitrator, will be in the English language.

The accompanying copy marked "duplicate" was filed for the Arbitrator to present to the representative of Costa Rica.

Accept, Sir, the renewed assurances of my highest consideration

H. Guzman

Annex 31

NOTE FROM COMMANDANT OF THE ROSALÍA REVENUE GUARD TO THE DEPUTY INSPECTOR OF THE TREASURY, 20 OCTOBER 1915

SOURCE: ARCHIVO NACIONAL DE COSTA RICA.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Rosalía, 20 October 1915

Deputy Inspector of the Treasury

San Carlos

With pleasure I report on the service provided by this Revenue Guard Post from 21st past present to 20th present in regards to the movement of vessels, assignments and the list of workers who have provided their services during the present month. The movement of vessels was as follows:

Sept. 21st at 11 am a boat docked coming from Tres Amigos, guided by David Salazar. Crew: Segundo Alvarez. Departed to Boca de San Carlos, without cargo.
22nd at 2 pm a boat docked coming from Castillo, guided by Federico Méndez. Passengers: Carmen Reyes and 2 children. Departed to La Ceiba. …

…Oct. 4th at 3pm a boat docked coming from San Juan del Norte guided by Ester Arce. Crew: Ambrosio Jirón and José Castillo. Departed to Aguas Zarcas, without cargo.
4th at 2 pm a boat docked coming from Sarapiquí, guided by Mr. Leslie E. Lynn, a crew member and three passengers. …

…The operational service between passed 21st to the 20th present was as follows: September 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 only daily and nocturnal service. October 1, an assignment by Arturo Gonzalez and Zacarias Esquivel, departed to Boca the Rio San Carlos, returning without incident on the 3rd …

…
Yours sincerely

Narciso Quirós M. (Signature illegible)
Deputy Inspector of the Treasury

Annex 32

NOTE FROM COMMANDANT OF THE ROSALÍA REVENUE GUARD TO THE DEPUTY INSPECTOR OF THE TREASURY, 18 DECEMBER 1915

SOURCE : ARCHIVO NACIONAL DE COSTA RICA.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

No. 28

Rosalía, 18 December 1915

Deputy Inspector of the Treasury

San Carlos

I transmit the report on the service provided by this Revenue Guard Post this month, from 20th past present to 18th present in regard to the movement of vessels, assignments, the tax collection for the introduction of merchandise and the list of workers who have provided their services during the present month. The movement of vessels was as follows:

Nov.	20th at 3 pm a boat docked coming from Boca de Tres Amigos, guided by Felix P. Mejia. Passengers: Santiago Duarte, José Sequeira and Ermelnida Castro. Departed to Boca de San Carlos, without cargo. …

… The operations that took place between the past 20th to the 18thpresent were as follows:…

30th at 6 am a task force departed to Muelle de San Carlos, formed by the guards Eliseo Villalobos and Ismael Trejos…

15th a task force formed by the guards Raf Fallas and Ismael Trejos departed to Buena Vista…

20th a mail assignment by Raf Fallas departed …

… Yours sincerely

Narciso Quirós M.
Corporal of the Guard Post

(Signature illegible)
Deputy Inspector of the Treasury

Annex 33

NOTE FROM SUB-INSPECTOR OF THE REVENUE GUARD IN BOCA DE SAN CARLOS TO LIEUTENANT LOPEZ OF THE GENERAL INSPECTORATE OF THE TREASURY, 26 JULY 1968

SOURCE : ARCHIVO NACIONAL DE COSTA RICA.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

MINISTRY OF THE TREASURY
General Inspectorate
(Revenue Guard)

San José, Costa Rica

26 July, 1968
MOUTH OF THE SAN CARLOS RIVER

Lieutenant López
General Inspectorate of the Treasury
San José

Dear Sir:

For your information, I am sending a complaint filed in this office by Mr. Pablo Lozano, regarding Ipecac located in the place named INFIERNITO, by the San Juan River. I went to said place in company of the Fiscal Guard MISAEL MURILLO BARBOZA, and indeed there was Ipecac. I made an inventory which showed the following: the plantation measures 1000 cubic "varas", 500 "varas" are 18 months old and the other 500 are 12 months old. The Ipecac needs two years before it can be harvested and sold. I will be checking on it because it could be harvested prematurely.

I brought a few samples of the Ipecac which I will send to you soon.

Sincerely yours,

Manuel V. Rodríguez Reyes
Deputy Inspector of the Treasury
MOUTH OF THE SAN CARLOS RIVER

Misael Murillo Barboza
Fiscal Guard
MOUTH OF THE SAN CARLOS RIVER

Note: The owner of this Ipecac is Mr. JUAN RODRIGUEZ OLLES

Annex 34

NOTE FROM SUB-INSPECTOR OF THE REVENUE GUARD IN BOCA DE SAN CARLOS TO LIEUTENANT LOPEZ OF THE GENERAL INSPECTORATE OF THE TREASURY, 29 JULY 1968

SOURCE: ARCHIVO NACIONAL DE COSTA RICA.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

MINISTRY OF THE TREASURY
General Inspectorate
(Revenue Guard)

San José, Costa Rica

29 July 1968
Mouth of the San Carlos
River

Lieutenant López
General Inspectorate of the Treasury
San José

Dear Sir:

On Monday 29 July 1968, I went on assignment accompanied by Fiscal Guard MISAEL MURILLO BARBOZA and Mouth of Sarapiquí Park Ranger Mr. RUBEN LAO HERNANDEZ, to the place called POCO SOL by the San Juan River, in order to verify the felling of trees, of approximately two hundred and fifty "varas", when we arrived to the place we verified that, as had been denounced by Captain Scot of Los Chiles de Grecia, said felling had taken place.

The case was forwarded to the Main Police Agency of Los Chiles de Grecia, where it was signed and sealed. I am sending you the report on the tree felling for your information.

Sincerely yours,

Manuel V. Rodríguez Reyes
Deputy Inspector of the Treasury
Mouth of the San Carlos River
Carlos River

Misael Murillo Barboza
Fiscal Guard
Mouth of the San

Annex 35

NOTE FROM THE REVENUE GUARD OF BOCA DE SAN CARLOS TO CHIEF OF PERSONNEL OF THE GENERAL INSPECTORATE OF THE TREASURY, 5 AUGUST 1968

SOURCE: ARCHIVO NACIONAL DE COSTA RICA.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

MINISTRY OF THE TREASURY
General Inspectorate
(Revenue Guard)

San José, Costa Rica

5 August 1968

Captain
Jorge Gamboa G.
Chief of Personnel
General Inspectorate of the Treasury
San José

Dear Sir:

I herewith allow myself to inform you about the assignments carried out during the month of July, complaints filed with the Inspection.-

On 24 July one for the revision of commercial licenses along the San Carlos River.
On 26 July one in El Dorado on the San Juan River, concerning some Ipecac.
On 26 July one in Infiernito concerning some Ipecac.
On 29 July one in Pocosol in relation to the felling of trees

Total assignments for complaints: four (4).

I would also like to remind you about Guard Carlos Oviedo Rojas. As per your recommendation, I spoke to the Colonel and he said he would speak to you about the transfer.

At the same time, I would like to remind you that I was transferred from the Customs Guard to the Revenue Guard. To keep track of my record, I would like to remind you that my vacation period starts on September 1, for the necessary arrangements.

Sincerely yours,

(signed)

Manuel V. Rodríguez Reyes
Deputy Inspector of the Treasury
Mouth of the San Carlos River

Annex 36

COSTA RICAN POLICE MAJOR, FRANCISCO CORDOBA CORDOBA, TO COSTA RICAN MINISTER OF PUBLIC SECURITY, LUIS FISHMAN Z., NOTE NO. C.D. 0666-91, 19 AUGUST 1991.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

MINISTRY OF PUBLIC SECURITY
SAN JOSE, COSTA RICA

No. C.D. 0666-91

Puerto Viejo de Sarapiquí
19 August, 1991

Mr. Luis Fishman Z.
Minister of the Interior and Public Security

Dear Sir:

I proceed to report the essential needs of the Border Police at Sarapiquí.

SITUATION

Section 1:

The district of Puerto Viejo belongs to the canton of Sarapiquí, which is the tenth canton of the province of Heredia; located on the north-eastern side of our country, next to the San Juan River of the neighbouring country of Nicaragua. It currently has a population of thirty thousand (30,000) people which tends to grow considerably, because of the banana companies that just began to operate here.

Section 2:

Perimeter of jurisdiction:

Hamlets that are serviced by land: Distrito La Virgen, Bajos de Chilamate, Pueblo Nuevo, El Roble, Chilamate, Cristo Rey, La Guaria, Puerto Viejo, El Muelle, Tres Rosales, El Estero, Caño San José, La Delia, El Tigre Sur, Flaminia, Isla Grande, Jugos del Campo, La Chávez, Horquetas, Las Marías, Colonia San José, and Zapote.

Hamlets that are serviced by waterway (Sector A): Sarapiqui River, Sucio River, Masaya, Los Arbolitos, Pangola, Los Angeles, La Ceiba, La Trinidad.

Hamlets that are serviced by waterway (Sector B): Ochoa, Palo Seco, Cureña, Isla Morgan, Cureñita, Remolino Grande, Remolinito, Caño Tambor, Caño Copalchí, Boca de Sarapiquí, Boca Las Marías, Boca La Tigra, Isla Culebra, Puerto Lindo, Caño Zapote, Caño Sardinal, Caño Chirripó, Caño Negro, Caño Valiente, and Quebrada la Yaca.

TOTAL: FIFTY HAMLETS

…

Services in Border Posts.

Second Platoon: With a total of 25 men, distributed as follows:

DELTA EIGHT (Mouth of the Sarapiquí River):	1 Head of Post 5 men
DELTA TWELVE (Puerto Lindo):	1 Head of Post 5 men
DELTA FOUR (BARRA DEL COLORADO SUR) :	1 Head of Post 1 Boatman 5 men
DELTA FIVE (BARRA DEL COLORADO NORTE):	1 Zone Officer 5 men

AREA OF JURISDICTION:

Barra del Colorado accounts for a community of about 5,500 inhabitants.

Our Jurisdiction Area extends approximately for 400 square kilometres.

To travel to the Barra del Colorado Unit, we navigate using an azimuth from south to north, of 180° to 360°, with an approximate distance of 170 kilometres of fluvial course.

Yours sincerely,

BORDER POLICE OF SARAPIQUI

(signature)

Police Mayor
Francisco Cordoba Cordoba
Chief of Post

Annex 37

COSTA RICAN POLICE MAJOR AND CHIEF OF POST, FRANCISCO CÓRDOBA CÓRDOBA, TO COSTA RICAN DIRECTOR OF THE CIVIL GUARD, LIEUTENANT COLONEL GUILLERMO SÁENZ, NOTE NO. C.D.O. 081-92, 29 APRIL 1992.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

C.D.O 081-92.

Puerto Viejo de Sarapiquí
29 April, 1992

Lieutenant Colonel
Guillermo Sáenz Brenes
Director of the Civil Guard

Dear Sir:

I proceed to inform you of the basic needs of the Border Police of Sarapiquí.

SITUATION

Section 1:

The district of Puerto Viejo belongs to the canton of Sarapiquí, which is the tenth canton of the province of Heredia; located on the north-eastern side of our country, next to the San Juan River of the neighbouring country of Nicaragua. It currently has a population of forty five thousand (45,000) people which tends to grow considerably, because of the banana companies that just began to operate here.

...

Hamlets that are serviced by water (Sector A): Río Sarapiquí, Río Sucio, Masaya, Los Arbolitos, Toro Amarillo, Los Angeles, Pangola, La Ceiba, Media Vuelta, and La Trinidad.

Hamlets that are serviced by water (Sector B): Ochoa, Palo Seco, Cureña, Isla Morgan, Cureñita, Remolinito Grande, Remolinito Caño , Caño La Tigra, Isla Cureña, Puerto Lindo, Caño Zapote, Caño Sardinal. Caño Chirripó, Caño Negro, Caño Valiente and Quebrada La Vaca, Caño Tambor, Caño Copalchí, Boca de Sarapiquí, Boca Las Marías, Boca La Tigra.

TOTAL: Sixty Five Hamlets

...

In what is called the Deltas (advanced posts) we need to open Delta No. 7, because that is the location of the mouth of the Colorado River and the San Juan del Norte River of Nicaragua, a location with a constant movement of tourists, as well as of immigrants from the neighbouring country of Nicaragua.

The Nicaraguan Government has a Park Rangers Post from IRENE, to control Sylvester Flora and Fauna of the area. It has been coordinated with the officials of the Sandinista Army, stationed across Delta No. 8, so that the Park Rangers do not intercept the tourists and Costa Rican farmers who navigate along the Río Colorado and San Juan, so they travel freely, observing the legal conditions in accordance with the navigation treaties between both countries.

Clause C:

The following is a summary of the Deltas:

Delta # 8: Mouth of the Río Sarapiquí and Río San Juan.
Delta # 12: Located in Puerto Lindo at the Río Colorado that flows into the Atlantic Ocean.
Delta # 4: Located in Barra del Colorado, on the northern side.
Delta # 5: Located in Barra del Colorado, on the southern side. Main part of the block of this town. The last three posts belong to the Province of Limón, in the District of Barra del Colorado. There is a total of 15 men in these four Deltas.

With five more men we could cover Delta # 7.

Clause D:

For the area of Puerto Viejo and the Deltas we currently have a budget of 109 posts on a national level and 9 individual posts.

Requirements of the Atlantic Commando: 140 Civil Guards.

INFORMATION

With that number of men we could very well cover all the area that goes from the south to the north of Chilamate to Barra del Colorado and from Trinidad, Mouth of the San Juan, on the western side, up to Horquetas, on the eastern side.

Sincerely,
Atlantic Border Police, Sarapiquí

(signed)

Mayor Francisco Córdoba Córdoba

Annex 38

COSTA RICAN CHIEF OF POST, MAJOR FRANCISCO CÓRDOBA CÓRDOBA, TO COSTA RICAN DIRECTOR OF THE CIVIL GUARD, LIEUTENANT COLONFL GUILLERMO SÁENZ, NOTE NO. C.A. 372-92, 25 MAY 1992.

ENGLISH TRANSLATION BY COSTA RICA

Mr
Colonel
Guillermo Sáenz [illegible]
Director of the Civil Guard

Dear Sir:

As you know, based on Note No. 235-II-92 of 27 April, 1992, about a coffee berry borer plague, we are controlling coffee berries in vegetables and animals, in coordination with the Ministry of Agriculture and Livestock.

On 13 May, 1992, a group of Nicaraguan farmers came and filed a complaint with officers of the Sandinista Army, because their products could not pass to Costa Rica. Through the E.P.S. (Sandinista Army) they were informed about the problem, showing them the notes and informing that the post of the Civil Guard could not grant such authorization.

Whilst speaking to Lieutenant Mauricio Luciano Gaitán, in charge of the post of the Sandinista Army, he told me that the farmers claimed that if officials of the Ministry of Agriculture and Livestock did not come to discuss with them the situation, they would retaliate against the vessels that navigate through the San Juan River or they would close or try to block the free navigation in that area.

The Officers of the Sandinista Army are willing to help in case this threat becomes real, and they will support the Costa Rican authorities.

I contacted Mr. Eduardo Artavia Lobo, Agricultural Engineer of the Agricultural Extension Agency of Puerto Viejo de Sarapiquí, and he said he would inform his superiors. So far, I have not heard from him on the matter explained in the circular or Note addressed to this Atlantic Command as copy, and sent to Engineer Omar Amin Pau, Quarantine Department, Vegetal Health Department, San José.

TRANSLATION

MINISTRY OF PUBLIC SECURITY
SAN JOSE, COSTA RICA

C.A. 372 - 92

Puerto Viejo de Sarapiquí
25 May 1992

Mr.
Colonel
Guillermo Sáenz Brenes
Director of the Civil Guard

Dear Sir:

As you know, based on Note No. 355-B-92 of 27 April, 1992, about a coffee berry borer plague, we are controlling coffee berries in vegetables and animals, in coordination with the Ministry of Agriculture and Livestock.

On 17 May, 1992, a group of Nicaraguan farmers came and filed a complaint with officers of the Sandinista Army because their products could not pass to Costa Rica. Through the E.P.S. (Sandinista Army) they were informed about the problem, showing them the notes and informing that the post of the Civil Guard could not grant such authorisation.

Whilst speaking to Lieutenant Mauricio Lezama Gaitàn, in charge of the post of the Sandinista Army, he told me that the farmers claimed that if officials of the Ministry of Agriculture and Livestock did not come to discuss with them this situation, they would retaliate against the vessels that navigate through the San Juan River or they would close or try to block the free navigation in that river.

The Officers of the Sandinista Army are willing to help in case this threat becomes real, and they will support the Costa Rican authorities.

I contacted Mr. Eduardo Artavia Lobo, Agricultural Engineer of the Agricultural Extension Agency of Puerto Viejo de Sarapiquí, and he said he would inform his superiors. So far, I have not heard from him on the matter explained in the circular or Note addressed to this Atlantic Command as copy, and sent to Engineer Omar Amin Fun, Quarantine Department, Vegetal Health Department, San José.

On Thursday, 21 May 1992, we patrolled on the San Juan River up to Islas Morgan and to the mouth of San Juan del Norte, and everything was normal.

In coordination with the owners of cabins in Delta 4 – Barra del Colorado, we are controlling the flow of fishing and tourist boats. The only problem is that we do not have outboard motors and the only one we have in Barra, can barely take us across the river for personnel shifts. In other words, it is not working properly, and the 40 H.P. we have at the Command is used for assignments in the area and for shifts in the border posts. In short, there are only two outboard motors in bad condition.

I hope of having duly informed you, I remain.

Sincerely yours,

Chief Francisco Córdoba Córdoba
First Commander – Border Police
Sarapiquí

Cc: Lic. Luis Fishman Z., Minister of Public Security
Colonel Marino Donato Magurno. Director General of the Public Force
File
FCC/ymch.

Annex 39

COSTA RICAN FOREIGN MINISTER, ROBERTO TOVAR FAJA, TO NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, NOTE NO. DM-37-06, 26 JANUARY 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

The Minister of Foreign Affairs and Worship

January 26, 2006
DM-37-06

Excellency,

I am pleased to extend my greetings to Your Excellency, while referring to the information presented by the media, according to which the Illustrious Government of the Republic of Nicaragua has decided to begin works to dredge the San Juan River in its lower course.

In this respect, and if that information is true, according to the provisions of article 3, point 6, of the 1888 Arbitral Award of the President of the United States, Grover Cleveland, I respectfully request that Your Excellency provides us with the technical information concerning those works, particularly about the effect the dredging would have on the water level of the Colorado River of Costa Rica.

I take this opportunity to reiterate to Your Excellency, the assurances of my highest consideration.

Roberto Tovar Faja
Minister

His Excellency
Norman Caldera
Minister of Foreign Affairs
Republic of Nicaragua

Annex 40

NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, TO COSTA RICAN FOREIGN MINISTER, ROBERTO TOVAR FAJA, NOTE NO. MRE/DM-JI/262/02/06, 17 FEBRUARY 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Republic of Nicaragua – Central America

The Minister of Foreign Affairs

Managua, February 17, 2006
MRE/DM-JI/262/02/06

Excellency:

I am honoured to address Your Excellency to acknowledge receipt of your kind note DM-37-06, of January 26 of the current year.

In this respect, I would like to let you know that my Government is surprised by Your Excellency's alleged juridical basis for the request made in the above-mentioned note, because article 3, paragraph 6 of the Arbitral Award of the President of the United States, Mr. Grover Cleveland, dated March 22, 1888, does not remotely grant the Republic of Costa Rica any right whatsoever to make such a request.

However, as a contribution to the good relations existing between our peoples and Governments, and without any detriment of what was indicated above, I am honoured to inform, *ex gratia*, to Your Excellency, that as an integral part of the National Development Plan of the Government of the Republic of Nicaragua, presided by Eng. Enrique Bolaños Geyer, and at the request of Mr. César Collado, Municipal Mayor of San Juan de Nicaragua, infrastructure and improvement works for social benefit are being carried out in the Municipality of San Juan de Nicaragua, with the purpose of guaranteeing communication and exchange of articles of trade between the communities in that area, as well as with the rest of the national territory.

The purpose of those works is also to make better use of the resources that are arriving to the southeastern zone of the country, through cooperation programs for border zones that the Government is carrying out, with the support of cooperating countries and agencies.

Your Excellency knows perfectly well that Nicaragua faithfully fulfils its international obligations, and in the case mentioned in your Note, each and every one of the terms agreed to in the Jerez-Cañas Border Treaty and the Cleveland Award, particularly on what concerns article VI of the Treaty, which grants Costa Rica navigation [*con objetos de comercio*], in a sector of the San Juan River of Nicaragua.

I would also like to express to Your Excellency that the Government of Nicaragua wishes, within the spirit of the good neighbour policy and cordiality that reigns over our bilateral relations, to reserve its position concerning the affirmations and the juridical significance that your Note might contain, especially any eventual implication in connection with the case submitted by the Government of Costa Rica on September 29, 2005, before the International Court of Justice.

I take this opportunity to reiterate to Your Excellency, my highest consideration and esteem.

Norman Caldera Cardenal
Minister of Foreign Affairs

His Excellency
Roberto Tovar Faja
Minister of Foreign Affairs and Worship
Republic of Costa Rica

Annex 41

NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, TO COSTA RICAN FOREIGN MINISTER, ROBERTO TOVAR FAJA, NOTE NO. MRE/DM-AJ/340/03/06, 16 MARCH 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Republic of Nicaragua – Central America

The Minister of Foreign Affairs

Managua, March 16, 2006
MRE/DM-AJ/03/06

Excellency:

I am pleased to address Your Excellency to acknowledge receipt of your kind note DM-484-05 of October 20, 2005, in which you refer to measures adopted for navigation in the San Juan River of Nicaragua.

In this respect, I must express to Your Excellency that the Government of Nicaragua categorically rejects the groundless affirmations contained in your Note, especially the one that refers to navigation in that river, which as you state in your note, is customary among the Costa Rican dwellers of the border zone with Nicaragua. I must remind Your Excellency that the only kind of navigation allowed for Costa Rican vessels, pursuant to the Jerez-Cañas Border Treaty and the Cleveland Award, the only international instruments that apply for the subject matter of your Note, is [*con objetos de comercio*] in a sector of the San Juan River of Nicaragua.

Therefore, taking into consideration the exclusive dominion and sovereign jurisdiction that Nicaragua has over the waters of the San Juan River, pursuant to the Jerez-Cañas Border Treaty and the Cleveland Award, Nicaragua has the right to establish regulations for navigation in that river, without affecting the provisions of the aforementioned international instruments.

I would also like to express to Your Excellency that the Government of Nicaragua wishes, within the spirit of the good neighbour policy and cordiality that reigns over our bilateral relations, to reserve its position concerning the affirmations and the juridical significance that your letter might have, especially any eventual implication in connection with the case submitted by the Government of Costa Rica on September 29, 2005, before the International Court of Justice.

I take this opportunity to reiterate to Your Excellency, my highest consideration and esteem.

Norman Caldera Cardenal

His Excellency
Roberto Tovar Faja
Minister of Foreign Affairs and Worship
Republic of Costa Rica

Annex 42

COSTA RICAN FOREIGN MINISTER, ROBERTO TOVAR FAJA, TO NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, NOTE NO. DM-187-06, 5 MAY 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

The Minister of Foreign Affairs and Worship

May 5, 2006
DM-187-06

Excellency:

I am pleased to extend my greetings to Your Excellency while referring to your notes MRE/DM-JI/262/02/06, dated February 17, 2006 and MRE/DM-JI/340/03/06, dated March 16, 2006, respectively.

Concerning your note of February 17, 2006, I wish to state that Costa Rica greatly desires that navigation on the San Juan River be expeditious along its whole length, for the primordial benefit of the inhabitants of the zone. However, those improvement works must be carried out without causing any damage to Costa Rican territory, as provided for in the 1888 Award of the President of the United States.

Regarding your additional response of March 16, in connection with my note of October 20, 2005, in which Your Excellency expresses that my note contains "groundless affirmations", my Government naturally rejects such considerations and does not find any reason for them, considering that in any case it is matter that is under judicial consideration within the framework of international law.

Finally, I would like to express that the intention of the contents of my notes is to promote the understanding, cordiality, and good neighbour relations between our two countries, based on the fraternal relations that should exist between neighbouring and civilized nations, as well as on the provisions of international law.

I take this opportunity to reiterate to Your Excellency, my highest consideration and esteem.

Roberto Tovar Faja

His Excellency
Norman Caldera Cardenal
Minister of Foreign Affairs
Republic of Nicaragua

Annex 43

NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, TO COSTA RICAN FOREIGN MINISTER, ROBERTO TOVAR FAJA, NOTE NO. MRE/DM-JI/511/05/06, 8 MAY 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Republic of Nicaragua – Central America

The Minister of Foreign Affairs

Managua, May 8, 2006
MRE/DM-JI/511/05/06

Excellency:

I am pleased to address Your Excellency to acknowledge receipt of your kind note DM-187-06. of May 5 of the current year.

In this respect, I would like to reiterate that the arguments used by Your Excellency in the above mentioned note, as has become the custom of Costa Rica, radically depart from the text of the 1858 Jerez – Cañas Border Treaty and the 1888 Award of President Cleveland, the only instruments that govern the juridical status of the San Juan River of Nicaragua.

To this effect, on behalf of my Government, it is my duty to reiterate the contents of my Notes MRE/DM-JI/262/02/06 and MRE/DM-JI/340/03/06 of February 17 and March 16, 2006, respectively.

My Government, also deeply regrets finding in the above mentioned note, phrases such as **"Costa Rica greatly desires that navigation on the San Juan River be expeditious along its whole length, for the primordial benefit of the inhabitants of the zone"** because it is a new example of the arbitrary, expansive, and groundless way in which the stipulations of the Jerez-Cañas Treaty and President Cleveland's Award are being violated.

I reiterate to Your Excellency that the Treaty only grants your country a limited navigation right [*con objetos de comercio*] in a section of the San Juan River of Nicaragua, and not along its whole length, as it could be inferred from your note, thus contradicting not only the above mentioned instruments, but also the statements made by Your Excellency as well as those of your predecessors, and proposing unusual pretensions that do not contribute at all to the stable relations and good will that should prevail between neighbouring countries, which Nicaragua seeks at all times.

Article 6 of the Treaty, which I reiterate and underline in its relevant parts, is clear and categorical and literally reads as follows:

"The Republic of Nicaragua," will have the dominion and sovereign jurisdiction over the waters of the San Juan River, from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica will have perpetual right of free navigation in those waters, between the said mouth up to three English miles before reaching Castillo Viejo [con objetos de comercio], with Nicaragua or to the interior of Costa Rica through the San Carlos or Sarapiquí rivers or any other way originating from the part in the bank of the San Juan that corresponds to this Republic."

Finally, on behalf of my Government, I expressly reserve our position concerning the affirmations and the juridical significance that your letter might have, especially any eventual implication in connection with the case submitted by the Government of Costa Rica on September 29, 2005, before the International Court of Justice.

I take this opportunity to reiterate to Your Excellency, my highest consideration and esteem.

Norman Caldera Cardenal

His Excellency
Roberto Tovar Faja
Minister of Foreign Affairs and Worship
Republic of Costa Rica

Annex 44

DIRECTOR, COSTA RICAN SOCIAL SECURITY FUND, HEALTH AREA PUERTO VIEJO DE SARAPIQUÍ, DR. THAIS CHING ZAMORA, TO FIRST CONSUL, NICARAGUAN CONSULATE, CIUDAD QUESADA, LICENCIADO MARIO RIVAS BALDELOMAR, NOTE NO. 346-2006, 14 JUNE 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

CAJA COSTARRICENSE DE SEGURO SOCIAL
(Costa Rican Social Security Fund)
PUERTO VIEJO DE SARAPIQUI HEALTH AREA
NORTHERN CENTRAL REGION

June 14, 2006
346-2006

Licenciado
Mario Rivas Baldelomar
First Consul
Nicaraguan Consulate, Ciudad Quesada

RE: REQUEST FOR COLLABORATION

Dear Sir:

We are hereby bringing to your attention the situation we have been facing since May 10, 2006. The Immigration officers at the Nicaraguan border post in the San Juan River are requiring from us that in order to continue with the medical tours on the river we must count with the approval of the Nicaraguan Vice-Consul in Sarapiquí.

Therefore this Medical Office, through letter 275 – 2006, submitted a request for that permit to Mr. Duilio Hernández, Nicaragua's Vice-Consul in Sarapiquí.

In his letter CNS 014/05/06, dated May 19, 2006, Mr. Hernández writes:

> "...In this respect, after the necessary consultations and inquiries with the immigration post mentioned by you as well as other competent authorities, I have been informed that if the Office under your honourable charge needs to use the San Juan River of Nicaragua to provide health services to the Costa Rican communities of Tambor, Fátima, and San Antonio, you must comply with the requirements that are normally established for the duly authorized entrance of foreign persons and vessels into Nicaraguan territory. Therefore, I must inform you that this Vice-Consulate is not in charge of granting navigation permits for vessels ...."
>
> (I enclose a copy of the letter).

Later he told me by phone that the normal requirements to navigate through Nicaraguan territory are: passport, visa, and a fee of $ 25 per person.

This measure harms the neediest people in that zone, who do not even have minimum health and education conditions and employment sources. We are talking of a total of 449 people, 123 families, 50% of which are from Nicaragua. Among these are 198 children between the ages of 0 and 9 years, 109 teenagers, 209 adults, and 23 senior citizens. This is also affecting the officers who work at the border post of the Nicaraguan Army in la Trinidad, to whom we have always provided our services whenever they have requested.

Since this is a humanitarian matter, whose main objective is to provide medical services to all the border population, regardless of their migratory, economic, or social conditions, we are asking for your good offices so that our functionaries can continue providing medical attention in that zone, as has always been done. The team in charge of this mission includes: a doctor, a nurse's aide, a pharmacy technician, a technical assistant for primary care and a network clerk.

We look forward to your prompt reply.

Sincerely yours,

PUERTO VIEJO DE SARAPIQUÌ HEALTH AREA
Dr. Thais Ching Zamora
Director

Cc: Dr. Amalia Carvajal Alvarado, Regional Director
Lic. Luz del Carmen Corea Mayorga, Head of Immigration and Foreign Status, District of the San Juan River
Colonel Ricardo Sánchez Méndez, Head of the Southern Military Detachment of the District of the San Juan River

Annex 45

COSTA RICAN FOREIGN MINISTER, BRUNO STAGNO UGARTE, TO NICARAGUAN FOREIGN MINISTER, NORMAN CALDERA CARDENAL, NOTE NO. DM-254-06, 14 AUGUST 2006.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

The Minister of Foreign Affairs and Worship

August 14, 2006
DM-254-06

Excellency:

I am pleased to extend my greetings to Your Excellency and inform you that the authorities of the Ministry of Health of Costa Rica have expressed their concern for the restrictions they have encountered to render basic health services and deliver food, education, and stimulation in the northern central region of the country. Since last June, the boat of the Ministry of Health that usually navigated along the San Juan River to provide those services to the people living in that zone has not been allowed to navigate in that river.

Because of this, Excellency, aside from the positions of our countries with respect to the subject of Costa Rican navigation on the San Juan River, my Government respectfully urges the Illustrious Government of Nicaragua to eliminate the restrictions imposed for the navigation of Costa Rican authorities of the Ministry of Health in that river, so that the integrity and health of the people of that zone will not be affected, who in their majority belong to very poor families. My Government trusts that Your Excellency and the Illustrious Government of Nicaragua understand the human significance of this situation, and will agree to take the necessary steps to solve it.

I take this opportunity to reiterate to Your Excellency, my highest consideration.

Bruno Stagno Ugarte

His Excellency
Norman Caldera Cardenal
Minister of Foreign Affairs
Republic of Nicaragua

Annex 46

CO-ORDINATOR OF THE NORTHERN REGIONAL OFFICE OF THE OMBUDSMAN'S OFFICE, LICDA. LAURA NAVARRO RODRÍGUEZ, TO CONSUL OF NICARAGUA AT CIUDAD QUESADA, MARIO RIVAS, NOTE NO. DHR-RN-051-2007, 22 MAY 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

DEFENSORÍA DE LOS HABITANTES

San Carlos, May 22, 2007

No. DHR – RN – 051 – 2007

TO: **Mr. Mario Rivas**
Consul
Nicaraguan Consulate

FROM: **Licda. Laura Navarro Rodríguez**
Coordinator Northern Regional Head Office
Ombudsman's Office

SUBJECT: **Authorization to navigate the San Juan River**

I respectfully request your authorization to navigate the San Juan River on the 25th, 26th, and 27th, because several organisations of the region will participate in the Environment and Health Fair that will be held by the high school of Boca del Río San Carlos. The roads are in bad condition and it is difficult to access the community of Cureña by land.

This permit is for officials of the Instituto Mixto de Ayuda Social (Joint Institute for Social Assistance) who will visit poor families in the community.

I appreciate your cooperation in this matter.

Annex 47

NICARAGUAN MINISTER COUNSELLOR, EMILIO RAPPACCIOLI PASOS, TO CO-ORDINATOR OF THE NORTHERN REGIONAL OFFICE OF THE OMBUDSMAN'S OFFICE, LICDA. LAURA NAVARRO RODRÍGUEZ, NOTE NO. ENCR/NF/EN/133/2007, 25 MAY 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Embassy of Nicaragua

San José, May 25, 2007
ENCR/NF/EN/133/2007

Licenciada
Laura Navarro Rodríguez
Coordinator Northern Regional Head Office
Ombudsman Office
Republic of Costa Rica

Dear Licenciada Navarro:

I am pleased to answer your kind note of May 22, 2007, received on May 22, 2007, in which you request **"AN AUTHORISATION FROM THE NICARAGUAN GOVERNMENT TO NAVIGATE THE SAN JUAN RIVER TO PARTICIPATE IN THE HEALTH AND ENVIRONMENT FAIR THAT WILLL BE HELD BY THE LOCAL HIGH SCHOOL, AND VISIT POOR FAMILIES IN THE COMMUNITIES OF LA CUREÑA AND BOCA DE SAN CARLOS".** After this Embassy consulted with the Nicaraguan Ministry of Foreign Affairs, we extend a special authorisation to navigate the San Juan of Nicaragua River for the aforementioned purposes and it cannot be used for any other purposes or places different from the aforesaid ones, or in violation of Nicaragua's full sovereignty over the River.

This permit is a gesture of friendship, good neighbour policy, and good faith courtesy and it cannot be used in any other way or with purposes which are harmful to Nicaragua in any way or circumstance.

This permit will be valid only for the 25th, 26th and 27th of May, 2007.

With no further matters to discuss.

Emilio Rappaccioli Pasos
Minister Counsellor

Annex 48

NICARAGUAN EMBASSY IN COSTA RICA, "AUTHORIZATION TO NAVIGATE" GIVEN TO THE OMBUDSMAN'S OFFICE AND THE MINISTRY OF HEALTH PERSONNEL, 25 MAY 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

EMBASSY OF NICARAGUA

AUTHORIZATION FOR NAVIGATION

The Embassy of Nicaragua in Costa Rica, by the authorisation of the Ministry of Foreign Affairs of Nicaragua, grants this special authorisation to navigate the San Juan of Nicaragua River, to the officials and vessels of the Ombudsman's Office and the Ministry of Health of the Republic of Costa Rica, as per the request received in this office on 22 May 2007, that requests **"AUTHORISATION FROM THE NICARAGUAN GOVERNMENT TO NAVIGATE THE SAN JUAN RIVER TO PARTICIPATE IN THE ENVIRONMENT AND HEALTH FAIR OF THE LOCAL HIGH SCHOOL, AND VISIT POOR FAMILIES IN THE COMMUNITIES OF LA CUREÑA AND BOCA DE SAN CARLOS".**

Nicaraguan authorities have the Right to cancel this permit in case of a violation of the laws of the Republic of Nicaragua. Also, the bearers of this permit should undergo routine checks from the corresponding authorities.

We hereby extend an authorization to navigate the San Juan River, valid only for the 25th, 26th and 27th of May, 2007.

Given in the city of San José, Costa Rica, on the 25th of May, 2007.

Emilio Rappaccioli Pasos
Minister Counsellor

Annex 49

IMAS REGIONAL MANAGER IN SAN CARLOS, MARVIN CHAVES THOMAS, TO NICARAGUAN CONSULATE, CIUDAD QUESADA, JOSÉ REINALDO RODRÍGUEZ LINDO, NOTE NO. GRHN-188-08-07, 14 AUGUST 2007.

ENGLISH TRANSLATION BY COSTA [illegible]ICA

TRANSLATION

INSTITUTO MIXTO DE AYUDA SOCIAL
(Joint Institute for Social Assistance)

August 14, 2007
GRHN – 188 – 08 – 07

Licenciado
José Reinaldo Rodríguez Lindo
Nicaraguan Cónsul
Costa Rica – Northern Zone

Dear Sir:

I respectfully request your authorisation to navigate the San Juan River on the 22nd and 23rd of August, 2007, for the house visits from officials of the INSTITUTO MIXTO DE AYUDA SOCIAL (IMAS) to poor families living on the margins of the San Juan River on the Costa Rican side (many of which are from Nicaragua), in order to bring financial aid so that their teenagers can study at the high school in Boca del Río San Carlos.

Navigation along the San Juan River is necessary because the roads that travel to those communities have been destroyed by heavy rains, which makes them inaccessible.

This permit would have to be extended to the following officials from the INSTITUTO MIXTO DE AYUDA SOCIAL (IMAS):

Name of the Official	I.D. card Number
Ana Yadira Pizarro Palma	3-230-854
Marianela Rojas Gómez	1-1090-302
Cinthia Serracin Badilla	1-1108-207
Alexandra Loría Sánchez	2-485-067
Luis Arce Rojas	2-258-459
Hannia Valverde Hidalgo	1-784-858

I appreciate your cooperation in this matter which will benefit the families of this region.

Sincerely yours,
Lic. Marvin Chaves Thomas
Regional Manager IMAS, San Carlos

CC: Lic José Rodolfo Cambronero, Assistant IMAS Social Development Manager
Lic Ana Grace Fernández, Heredia Regional Manager, IMAS
Archives

Annex 50

LEONEL MORALES CHACÓN, 30 APRIL 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER TWO HUNDRED AND FORTY FOUR - ONE: Before me, **TATIANA VARGAS MASÍS**, Notary Public of San José, appears **LEONEL MORALES CHACON**, of Costa Rican nationality, of legal age, resident of Boca de San Carlos, farmer, identification card number **two – three hundred and twenty four – nine hundred and twenty nine**, who, having been warned about the penalties established by law in the Penal Code for the crimes of false testimony, perjury and ideological falsity, declares under oath: FIRST: That since the year one thousand nine hundred seventy nine he owns a cattle farm in the region of San Antonio de Cutris de San Carlos, which is located towards the west of Boca de San Carlos, where he resides, in which he also grows some crops. Due to the lack of any roads that connect those communities he had always used the San Juan River as communication waterway between his farm and Boca San Carlos. SECOND: He continues stating that before Costa Rica presented the case against Nicaragua he used to travel almost once a week to his farm, for which he took his boat, reported to the Army and MARENA post in Boca San Carlos, and went to San Antonio. He says that sometimes they charged him a departure clearance but other times they did not impose any charge. THIRD: He indicates that after Costa Rica presented the case against Nicaragua the Nicaraguan authorities started demanding Costa Rican residents in the area to fly the Nicaraguan flag in their boats. FOURTH: He says that due to the restrictions that the Nicaraguans began to impose on Costa Rican navigation on the San Juan River, and mainly because of the verbal abuse to which they were being subjected each time they reported themselves to the Nicaraguan Army posts, he had avoided using the river, and because of that he had not visited his farm for about six months. However, on twenty-four April of this year he had to go to his farm to take some calves, for which he went to the Army post to report himself. He says that to his surprise he was informed that that day he could not be granted the authorization to navigate, and that he should come back in two days, that is, on Thursday twenty-six. He returned that day and again was refused the authorization to navigate, without being given any explanation, as a result he deemed it prudent not to insist on the subject, and thus he had to return to his residence without being able neither to go to his farm nor to transfer his cattle. FIFTH: He says that he knows of other cases of neighbours who also have had problems transporting their cattle through the San Juan River. SIXTH: He indicates that at present the neighbors in the area are forced to carry a courtesy departure clearance and that in order to avoid problems, he tries not to navigate through the San Juan River, but he knows that people who do not live in the area are demanded visas and passports to allow their navigation. However, the flying of the Nicaraguan flag is indispensable for the navigation on the River of any Costa Rican boat. That is all. I issue a first testimony hereof. Having read the foregoing text to the party hereto, he approved it, and we both sign in San Jose, at the sixteen hours and fifteen minutes of thirty April of two thousand and seven. ---L.M.C. ------------ -------------- T.V.M. ---------------------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER TWO HUNDRED AND FORTY FOUR-ONE, INNITIATED ON PAGE ONE HUNDRED AND FIFTY SEVEN FRONT OF VOLUME ONE OF MY PROTOCOL. HAVING COMPARED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, I APPROVE IT AND ISSUE A FIRST TESTIMONY THEREOF AFTER HAVING AUTHORIZED THE ORIGINAL WITH MY SIGNATURE.- (illegible signature)

Annex 51

CARLOS LAO JARQUÍN, 28 JULY 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER ONE HUNDRED AND FIFTY-THREE - SIX: Before me, **GUSTAVO ARGUELLO HIDALGO,** Notary Public with office in San José, San Pedro Monterrey, from Perimercados one hundred meters north, passing through the town of Puerto Viejo de Sarapiqui, in Hotel El Bambu, where Mr. **CARLOS LAO JARQUIN,** of Costa Rican nationality, of legal age, single, merchant, resident of Puerto Viejo de Sarapiqui, twenty five meters west and twenty five meters north from the Ministry of Health, identification card number **four – one hundred and thirty two – five hundred and seventy two,** appears AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false declaration, declares under oath the following: FIRST: He states that since the month of November of two thousand five, when the Government of Nicaragua imposed a requirement for Costa Ricans to carry a passport with a Nicaraguan visa for the navigation on the San Juan River, he has seen the activity of transportation of tourists from Puerto Viejo de Sarapiqui to Barra del Colorado and the Tortuguero Channels in Costa Rican territory very gravely affected, to the point that he is near to abandoning his business as a result of those and other restrictions that Nicaragua has imposed on Costa Rican navigation. SECOND: He continues stating that never, in the many years he has been navigating the San Juan River, has he requested any permission from Nicaraguan authorities to conduct such navigation. THIRD: He indicates in the past, when the Nicaraguan authorities made him report at the military posts of that country on the river, it was always with the purpose of charging the persons he was transporting the taxes Nicaragua imposed when the dispute with Costa Rica began, as well as to charge him the "departure clearance" tax, applied to his vessel, and occasionally to search people's belongings, and more recently check that passports held a Nicaraguan visa. Nevertheless, he states that the technical conditions of navigation of his vessel or the fulfillment of

security requirements have never been checked. He has never been informed by any Nicaraguan authority that he has to comply with any requirement or regulation about technical conditions for navigation and that he has never been notified of any regulation or law that requires the compliance with that type of requirement for the Costa Rican navigation on the San Juan River. He indicates that at the time of the Nicaraguan prohibition on navigation at night, when for reasons of emergency he was allowed to navigate, he was warned that said navigation was done under his own responsibility, stating that Nicaragua would not be responsible for any incident or accident. FOURTH: He says that he does comply with the navigation and security requirements set forth by Costa Rican law. That is all he wishes to state. I warned him of the value and legal scope of his statements. I postpone the issuance of a first testimony for tomorrow. Having read the foregoing it conforms, and we both sign in Sarapiqui, Province of Heredia, at eleven hours of the twenty-seven of July of two thousand and seven.-------------------------CARLOS LAO JARQUIN- --------------- G.ARGUELLO H. --------------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE HUNDRED AND FIFTY-THREE-SIX, WHICH COMMENCES ON PAGE ONE HUNDRED AND SEVENTY THREE FRONT OF VOLUME SIX OF MY PROTOCOL. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT. I APPROVE IT AND ISSUE A FIRST TESTIMONY AT TEN HOURS FIFTEEN MINUTES OF THE DAY TWENTY EIGHT OF JULY TWO THOUSAND AND SEVEN.- (illegible signature)

Annex 52

JORGE MANUEL LAO JARQUÍN, 28 JULY 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER ONE HUNDRED AND FIFTY-FOUR - SIX: Before me, **GUSTAVO ARGUELLO HIDALGO,** Notary Public with office in San José, San Pedro Monterrey, from Perimercados one hundred meters north, passing through the town of Puerto Viejo de Sarapiqui, where Mr. **JORGE MANUEL LAO JARQUIN**, of Costa Rican nationality, of legal age, single, merchant, resident of Puerto Viejo de Sarapiqui, from the School of Flaminia two hundred meters east, identification card number **four – one hundred and two – seven hundred and fourteen,** appear AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false declaration, declares under oath the following: FIRST: That since his last affidavit regarding the restrictions imposed by Nicaragua on Costa Rican navigation on the San Juan River, Nicaragua has imposed the obligation to carry a visa on Costa Ricans navigating the San Juan River. That this measure has harmed him as well as all other boatmen who obtain their living from the transportation of persons and tourists from Puerto Viejo de Sarapiqui to Tortuguero and other towns located in Costa Rican territory. SECOND: He continues stating that in the many years that he has had navigated the San Juan River, the Nicaraguan authorities have never asked him about the technical or safety conditions of his vessel, although he has been subjected to conditions regarding payment, visas and the seizure of particular goods, which is also applied to the people he transports. He says that on the thirty first of June of two thousand and six, when he was transporting missionaries carrying with them schooling material and health articles for the children of Remolinito, in Costa Rican territory, the Nicaraguan Military located in Boca de Sarapiqui ordered them that they could only stay for two hours in said town. THIRD: He says that he has never requested from the Nicaraguan authorities a written permission or anything else, for navigation on the San Juan River, though he has heard that in recent months Nicaraguan authorities

have been requesting said permissions. That is all he wishes to state. I warned him of the value and legal scope of his statements. I postpone the issuance of a first testimony for tomorrow. Having read the foregoing it conforms, and we both sign in Sarapiqui, Province of Heredia, at twelve hours of the twenty-seven of July of two thousand and seven.--------JORGE MANUEL LAO JARQUIN------------- G.ARGUELLO H. ----------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE HUNDRED AND FIFTY-FOUR-SIX, WHICH COMMENCES ON PAGE ONE HUNDRED AND SEVENTY THREE REVERSE OF VOLUME SIX OF MY PROTOCOL. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, I APPROVE IT AND ISSUE A FIRST TESTIMONY AT TEN HOURS FIFTEEN MINUTES OF THE DAY TWENTY EIGHT OF JULY TWO THOUSAND AND SEVEN.-

(illegible signature)

Annex 53

RODRIGO ANTONIO ZAMORA ARROYO, 28 JULY 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER ONE HUNDRED AND FIFTY FIVE - SIX: Before me, **GUSTAVO ARGUELLO HIDALGO,** Notary Public with office in San José, San Pedro Monterrey, from Perimercados one hundred meters north, passing through the town of Puerto Viejo de Sarapiqui, in Hotel El Bambu, where Mr. RODRIGO ANTONIO ZAMORA ARROYO, of Costa Rican nationality, of legal age, married, evangelical preacher, resident of Horquetas de Sarapiqui, Mahanaim, seven hundred meters from the Puerto Viejo crossroad, identification card number **one – nine hundred – one hundred and ninety two,** appear AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false testimony, declares under oath the following: FIRST: That in his condition as preacher of a Christian organization, he carries out charity activities for children of poor communities along the border area of Costa Rica, specifically in the towns of Tambor, Remolinito and Arbolito, the first two on the right bank of the San Juan River. The town of Arbolito is located at the bank of the Sarapiqui River, also in Costa Rican Territory. SECOND: That on nineteen March two thousand and seven, he accompanied a group of missionaries taking with them school and health articles to the communities of Tambor and Remolinito. At the mandatory stop point that the Nicaraguan Army imposes at their Post at the mouth of the Sarapiqui River, the Nicaraguan military boarded the vessel to search all belongings, seizing from them photographic cameras and the passports of all the people travelling and threatening them that they would bring dogs to search if they were carrying other cameras. The seized articles were given back at their return. Additionally, they only allowed them to visit the town of Remolinito, and prohibited them from visiting the town of Tambor, which is also in Costa Rican territory. THIRD: He continues stating that on occasion of this visit, he was informed that the Nicaraguan authorities were requiring written requests to allow the navigation; otherwise the navigation of Costa Ricans would be prohibited. As a result, he made a request dated sixteen March two thousand seven, directed to the Nicaraguan Embassy in Costa Rica. He says that when he arrived at the Nicaraguan Embassy in San Jose, he was attended by a member of staff who told him that if the missionaries travelling on the San Juan River were Costa Ricans there would be problems, to which he replied that they were mostly foreign missionaries. That is all he wishes to state. I warned him of the value and legal scope of his statements. I postpone the issuance of a first testimony for tomorrow. Having read the foregoing it conforms, and we both sign in Puerto Viejo de Sarapiqui, Province of Heredia, at thirteen hours of the twenty-seven of July of two thousand and seven.---

RODRIGO ANTONIO ZAMORA ARROYO-------------G.ARGUELLO H. ----------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE HUNDRED AND FIFTY-FIVE-SIX, WHICH COMMENCES ON PAGE ONE HUNDRED AND SEVENTY FOUR FRONT OF VOLUME SIX OF MY PROTOCOL. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, I APPROVE IT AND ISSUE A FIRST TESTIMONY AT TEN HOURS THIRTY MINUTES OF THE DAY TWENTY EIGHT OF JULY TWO THOUSAND AND SEVEN.- (illegible signature)

Annex 54

VICTOR JULIO VARGAS HERNÁNDEZ, MARLENY ROJAS VARGAS, MARIO SALAS JIMÉNEZ AND LEONEL MORALES CHACÓN, 29 JULY 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER ONE HUNDRED AND FIFTY SEVEN - SIX: Before me, **GUSTAVO ARGUELLO HIDALGO**, Notary Public with office in San José, San Pedro Monterrey, from Perimercados one hundred meters north, passing through the bordering town of Boca de San Carlos, at Doña Julia's Restaurant, Province of Alajuela, appear: VICTOR JULIO VARGAS HERNANDEZ, of legal age, single, officer of the Public Force assigned to the border area of Boca de San Carlos, which is also his residence, identification card number **five – one hundred and forty three – two hundred and ninety nine**, MARLENY ROJAS VARGAS, of legal age, married, math teacher at the border zone of Boca de San Carlos, with residence one hundred meters south of the border post, identification card number **two – four hundred and thirty eight – four hundred and fifty nine**, MARIO SALAS JIMENEZ, of legal age, widower, merchant, neighbour of the border zone of Boca de San Carlos, San Juan Supermarket, identification card number **nine – cero six – five hundred and ninety**, LEONEL MORALES CHACON, of legal age, single, farmer, neighbour of the border zone of Boca de San Carlos, from Doña Julia's Restaurant four hundred meters east, identification card number **two – three hundred and twenty four – nine hundred and nineteen**, all Costa Ricans, AND SAY: That having been warned about the penalties established by law for the crimes of perjury and false testimony, they declare under oath the following: FIRST: **Victor Julio Vargas Hernandez**, of aforesaid personal details, declares that, until today, the Nicaraguan authorities at the San Juan River post in this area continue to impose restrictions on Costa Rican free navigation on the San Juan River, to wit: the flying only of the Nicaraguan flag on Costa Rican vessels to be able to navigate the River; the payment of taxes, particularly for those Costa Ricans who do not live in the zone; all children travelling to school must report like all other Costa Ricans travelling through the River; the imposition of timetables only on Costa Rican vessels; search and inspections of private property; the prohibition on some Costa Rican riparians to navigate the river for having given opinions to the national press, and the seizure of artisanal fishing implements, including boats. He continues stating that said authorities continue to impose a prohibition on artisanal fishing for consumption on Costa Rican riparians. He also says that the application of restrictions and the threats to Costa Ricans are increased or made more severe when the guards are changed on posts. To allow Costa Rican navigation sometimes they demand payment in goods, through cigarettes, liquor or food. SECOND: **Marleny Rojas Vargas**, of aforementioned personal details, who is a teacher at the High School of Boca de Rio San Carlos, declares that because of her occupation the Nicaraguan military constantly demands that she submit lists bearing the names of the children students who must navigate the River in order to attend the High School, all of whom live in towns located in Costa Rican territory. In total there are sixteen children who must travel the River daily. She states that she knows that at the end of the year two thousand and six, the children were stopped by the Nicaraguan Military, who gave them a lecture for about an hour. She continues declaring that on one occasion a woman had a medical emergency, and urgently required some medicine, and when trying to help her, in order to obtain the medicine from the shop that sold it, in Costa Rican territory, she was forced to cross the San Juan River to request permission to make the purchase. THIRD: **Mario Salas Jimenez**, declares that on the occasion of a press report by national media about the situation of Costa Rican navigation on the San Juan River, personnel of the Nicaraguan Army came into Costa Rican territory to tell the media they could not take photographs from Costa Rican territory. He continues stating that in the same media report he was interviewed, and he described the restrictions suffered by the Costa Ricans on the River. The day after the interview, the officer in charge of the Army post in the area sent him a message telling him that he had to go to the Nicaraguan post to speak to him about the interview he had given, to which he refused. Ever since then he has feared navigating the River as a result of the reprisals that could be taken against him. He says that he knows that the Nicaraguan authorities continue to impose a prohibition on all fishing by Costa Rican neighbours in the River. FOURTH: **Leonel Morales Chacon** declares that the restrictions and prohibition imposed by Nicaragua to Costa Rican riparians of the River to fish for their basic consumption continues to date, under the threat of detention and seizure of their fishing implements and boats. That is all. That is all they wish to state. I warned them of the value and legal scope of their statements. I postpone the issuance of a first testimony for tomorrow. Having read the foregoing it conforms, and we sign in the Province of Alajuela, at twelve hours of the twenty-eight of July of two thousand and seven.---------VICTOR JULIO VARGAS HERNANDEZ-----------------------MARLENY ROJAS VARGAS---------MARIO SALAS JIMENEZ-----------------------LEONEL MORALES CHACON ----------- G.ARGUELLO H. ---------------------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE HUNDRED AND FIFTY-SEVEN-SIX, WHICH COMMENCES ON PAGE ONE HUNDRED AND SEVENTY FIVE REVERSE OF VOLUME SIX OF MY PROTOCOL. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, I APPROVE IT AND ISSUE A FIRST TESTIMONY AT TEN HOURS THIRTY MINUTES OF THE DAY TWENTY NINE OF JULY TWO THOUSAND AND SEVEN.- (illegible signature)

Annex 55

THAIS CHING ZAMORA, 8 AUGUST 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER ONE HUNDRED AND FIFTY NINE - SIX: Before me, **GUSTAVO ARGUELLO HIDALGO**, Notary Public with office in San José, San Pedro Monterrey, from Perimercados one hundred meters north, appears THAIS CHING ZAMORA, of Costa Rican nationality, of legal age, married, medical doctor, neighbour of Grecia, six hundred meters east of the public phone of Barrio Latino, identification card number three – two hundred and forty one – five hundred and twenty, AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false declaration, she declares under oath the following: FIRST: That she was appointed Director of the Health Area of Puerto Viejo de Sarapiqui, from the twenty third of August two thousand and four until the second of July two thousand and six. That her duties included the supervision of the execution of actions of morbidity care and the implementation of programs for health promotion and the prevention of and treatment of illnesses. The treatment is of particular relevance to the infant population, which is the most vulnerable to diseases. SECOND: She continues stating that she knows that the care activities are carried out with particular consideration at the border areas of Costa Rica, in the vicinity of the San Juan River, given the special conditions of poverty, vulnerability and distance of those communities, among other those of Tambor, Remolinito, San Antonio and Fatima, all located on the right bank of the San Juan River, in Costa Rican territory. That she knows that from time immemorial the health workers of Costa Rica have travelled to those communities by the San Juan River, as this is the only way to communicate to those places, and that during all this time, including the years two thousand and four and two thousand and five when she was in charge of that area, they were never required to request permission to conduct said navigation. THIRD: That on ten May two thousand and six, the Nicaraguan Military informed them that from that day on the usual navigation on the San Juan River to Costa Rican health workers was prohibited and that in order for these health workers to navigate, they had to go to the Nicaraguan Consulates in Costa Rica to obtain a Nicaraguan visa. She states that given the vulnerability and exposure to infectious-contagious diseases of those populations, among others malaria and dengue, and the chance that there could be a sanitary crisis outbreak that could threaten the lives of many people, the Health Area decided to contact the Nicaraguan authorities in Costa Rica to find a solution. For this purpose she sent notes to Nicaragua's Vice-consul in Puerto Viejo de Sarapiqui, and later to Nicaragua's Vice-consul in Ciudad Quesada, requesting the collaboration to conduct visits to the populations adjacent to the San Juan River. She continues stating that the Nicaraguan Vice-consul in Ciudad Quesada informed her that she had to request a special permit before the Nicaraguan Embassy in Costa Rica. Accordingly, she visited the Nicaraguan Ambassador in Costa Rica at his office, to whom she requested the collaboration, in the same terms that she had done before the Vice-consuls. Whilst thinking that she would get a favourable answer given the imperative need to provide the urgent health services, nevertheless, the Ambassador told her that in order to analyze the request, she had to change the term "Request for collaboration" to "Request of Authorization to navigate the San Juan River", otherwise her request would not be processed. He also informed her that her petition would be resolved by the Ministry of Foreign Affairs of Nicaragua. FOURTH: She says that her job is not to make considerations of legal character, and that given the imperative need to provide urgent services to the populations in order to safeguard the health and the lives of people, particularly of children and other social groups in risk in the area of the San Juan River, she wrote the note under the terms demanded by the Ambassador, all done as a result of the urgent state of necessity, given the aforesaid imminent sanitary risks. She continues stating that she does not know if Nicaragua answered her request. That is all she wishes to state. I warned her of the value and legal scope of her statements. I issue a first testimony at the time of printing the original. Having read the foregoing it conforms, and we sign in San Jose, at eleven hours of the eight of August of two thousand and seven.-----Illegible -------------- G.ARGUELLO H. ---------------- -----THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE HUNDRED AND FIFTY-NINE-SIX, WHICH COMMENCES ON PAGE ONE HUNDRED AND SEVENTY SEVEN REVERSE OF VOLUME SIX OF MY PROTOCOL. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, I APPROVE IT AND ISSUE A FIRST TESTIMONY AT THE TIME OF PRINTING OF THE ORIGINAL.- (illegible signature)

Annex 56

MARVIN CHAVES THOMAS, 5 NOVEMBER 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER NINETY SEVEN - SIXTEEN: Before me, **LUIS PABLO ROJAS QUIROS**, Notary Public with office in Guadalupe, Cartago, fifty meters south of the Sports Court, and passing by the province of San José, in San Pedro Monterrey, from Perimercados one hundred meters north, in the Law Firm Arguello & Associates, appears Mr. MARVIN CHAVES THOMAS, of Costa Rican nationality, of legal age, married once, Social and Economical Planner, neighbour of San Carlos Ciudad Quesada, housing development two thousand, next to Cocique New Generation, identification card number four – one hundred and forty five – eight hundred and fifteen, AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false declaration, he declares under oath the following: FIRST: That he is the Regional Manager of the Joint Institute for Social Assistance (IMAS) in San Carlos, Costa Rica's northern zone, and that the responsibilities of the Institute include a responsibility to fight poverty and to financially and materially assist the poorest people in the country, which is carried out through direct financial help, food, clothing, housing and scholarships for children of primary and secondary school age. In particular, in the region that his Institute operates, the Costa Rican communities along the bank of the San Juan River are among the poorest and most vulnerable in the country, particularly because of the high number of Nicaraguan families resident there who have children born in Costa Rica, which make up the majority of the population in said area, which IMAS assists. SECOND: He says that before the year two thousand six, IMAS personnel visited those communities using the San Juan River without requesting for permission. However, he says that the Nicaraguan authorities have been requiring that Costa Rican officials request permission in order to visit and aid those communities. THIRD: He continues stating that given the urgent need for IMAS to provide economic support to poor people in those communities, and in particular to support the children in those communities financially, so they can receive basic primary and secondary education, IMAS was placed in a position where it needed to request the authorization demanded by the Nicaraguan authorities to navigate the river, as there is no other means to reach those communities. Therefore that is the reason why he requested the permission from the Nicaraguan Consul in the Northern Zone on fourteen August two thousand seven. FOURTH: He says that up to the date of this affidavit, he has not received any answer from the Nicaraguan authorities, and that this is the only time he has made such request, since, as he stated at the beginning of this affidavit, said measure was imposed by Nicaragua recently. That is all he wishes to state. I warned him of the value and legal scope of his statements. I issue a first testimony. Having read the foregoing it conforms, and we sign in San Jose, at fifteen hours of the five November of two thousand and seven.------ ------------MARVIN CHAVES THOMAS-- -LUIS PABLO ROJAS QUIROS ----------------------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE NINETY SEVEN – SIXTEEN, WHICH COMMENCES ON PAGE ONE HUNDRED AND SIXTY TWO FRONT OF VOLUME SIXTEEN OF THE PROTOCOL OF THIS NOTARY. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, AND ISSUE A FIRST TESTIMONY AT THE TIME OF PRINTING OF THE ORIGINAL.- (illegible signature)

Annex 57

LAURA PATRICIA NAVARRO RODRÍGUEZ, 6 NOVEMBER 2007.

ENGLISH TRANSLATION BY COSTA RICA

NUMBER NINETY EIGHT - SIXTEEN: Before me, LUIS PABLO ROJAS QUIROS, Notary Public with office in Guadalupe, Cartago, fifty metres south of the Sports Court, and passing by the province of San José, in San Pedro Monterrey, from Perimercados one hundred meters north, in the Law Firm Arguello & Associates, appears Mrs. LAURA PATRICIA NAVARRO RODRIGUEZ, of Costa Rican nationality, of legal age, single, attorney at law, neighbour of Guadalupe, three hundred meters south from the Rovert, identification card number one – eight hundred and thirteen – zero eleven, AND SAYS: That having been warned about the penalties established by law for the crimes of perjury and false declaration, she declares under oath the following: FIRST: That she is the Coordinator of the Northern Regional Office of the Ombudsman's Office. The responsibilities of the Office include assistance to other public institutions, particularly those in charge of improving the living conditions of inhabitants of the area of Boca de Rio San Carlos, Cureña and other surrounding communities, and in particular of those inhabitants residing in the border zone. SECOND: She states that as a result of the recent prohibition imposed by Nicaragua upon Costa Rican public workers to continue navigating the San Juan River, some institutions in charge of social security and the improvement of the living conditions of the inhabitants are no longer visiting some of the communities located on the Costa Rican bank of the San Juan River, given that navigation on the river is the only means to reach them. As a result of the danger that those communities face because they have no access to those services, a Health and Environmental Fair was planned, to take place in the area of Boca de San Carlos, including a visit to some of those communities. THIRD: In order to secure the access of the Costa Rican workers to those isolated communities, and as a result of Nicaragua's demands for the request of permits, a request to the Nicaraguan Consulate on twenty two May two thousand and seven was made, so that the workers from the Joint Institute for Social Assistance could take financial assistance to the families living in the communities in the area of Cureña, at the Costa Rican bank of said river. FOURTH: She continues, stating that on twenty five May two thousand and seven she received an authorization from the Nicaraguan Embassy in Costa Rica, and not by the Consul, to whom she had originally sent the request. Despite having received the authorization, the trip was suspended due to weather conditions in the zone. That is all she wishes to state. I warned her of the value and legal scope of her statements. I issue a first testimony. Having read the foregoing it conforms, and we sign in San Jose, at twelve hours of six November of two thousand and seven.---------

---------------------------LAURA PATRICIA NAVARRO RODRIGUEZ--------

---LUIS PABLO ROJAS QUIROS —

------------------------THE FOREGOING TEXT IS A TRUE COPY OF DEED NUMBER ONE NINETY EIGHT – SIXTEEN, WHICH COMMENCES ON PAGE ONE HUNDRED AND SIXTY TWO REVERSE OF VOLUME SIXTEEN OF THE PROTOCOL OF THIS NOTARY. CONFRONTED THIS COPY WITH ITS ORIGINAL, I DEEM IT CORRECT, AND ISSUE A FIRST TESTIMONY AT THE TIME OF PRINTING OF THE ORIGINAL.- (illegible signature)

Annex 58

"NEW ARMY POSTS IN THE SAN JUAN RIVER" IN *EL NUEVO DIARIO*, MANAGUA, 26 MARCH 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

EL NUEVO DIARIO – Managua, Nicaragua
Monday, March 26, 2007

New Army Posts in the San Juan River

Conditions are improved for military personnel that protect sovereignty in the border zone between Nicaragua and Costa Rica

Tatiana Rothschuh
EL CASTILLO/ SAN JUAN DE NICARAGUA

Five new military posts along the San Juan River, furnished with solar-powered lighting and radio communications systems, were inaugurated by Army General Omar Halleslevens, who was accompanied by the Chiefs of Staff of the Nicaraguan Army.

In a marathon journey by boat, challenging the low flow of the river in some points, the Army retinue headed by Halleslevens, first inaugurated the military post in Bartola, located next to the Indio Maíz Reserve and in the San Juan River wildlife refuge. Then he inaugurated the post of Boca de San Carlos, and later those in Sarapiquí and Delta and, in view of the impassable way to Sanjuanillo, the military chiefs had to take a helicopter to end at the post of San Juan de Nicaragua.

Besides the new construction of the military post, which includes a waiting room, operations room, bedroom, kitchen with pantry, furnished dining room, storage room, waiting corridor, latrine, and water storage tank, the soldiers also have a T.V. set which is also powered by solar energy, although since the Nicaraguan satellite system does not reach that zone, they can only watch Costa Rican networks.

The Army General said that the efforts made by the military institution were aimed at improving living and working conditions for the members of the army stationed in the posts along the San Juan, where they protect national sovereignty at the border zone between Nicaragua and Costa Rica.

Stretching the Budget.

He said that the one million one hundred thousand Córdobas invested in the total construction and furnishing of the five military posts corresponds to the first stage, and it came out of last year's Army budget. According to the military chief, the cost of each one ranges between 206 thousand and 230 thousand Córdobas.

Halleslevens explained that after some 15 years without investing in military infrastructure, the clear deterioration of the facilities made them think of doing the same in the second and sixth military regions, among which he mentioned Wiwilí, Waslala, and Río Blanco.

He added that they are planning to carry out a second stage in the Southern Military Detachment, with the budget approved for this year, of one million 600 thousand Córdobas. They are planning to build the posts of Sábalos, Río Frío, Papaturro, and Palo de Arco, as well as making improvements in Las Tablillas and El Castillo. They will also make some improvements to the headquarters of the detachment. He said this year the investment would mainly be addressed to the V Military Command.

The Nicaraguan Army Chief was accompanied by the inspector, Major General Ramón Calderón Vindell; Brigade General Miguel Guzmán Bolaños, the Head of the Logistics Division; Infantry Colonel S.G. Héctor Arguello, the Head of the Finance Division; the Head of the Southern Military Detachment, Infantry Colonel S.G. Roberto Sánchez; Chief Aide-de-camp, Colonel Guillermo González Ortega, and Lieutenant Colonel Oscar Alberto Estrada, Head of the Infrastructure Division.

Nicaragua is right in The Hague

In connection with the case submitted by the Government of Costa Rica before the International Court of The Hague to be allowed armed navigation, the Nicaraguan Army General said he would rather not make any comments because this is a delicate subject which should be left in the hands of specialists, and should be dealt with by the government through the Ministry of Foreign Affairs; however he said that "Nicaragua is absolutely right concerning its position. I think that the final decision of this honourable Court will favour the position of the government of Nicaragua", said the military chief.

Annex 59

"NEIGHBOURS FROM THE SAN JUAN PLEA FOR HELP" IN *AL DÍA*, SAN JOSÉ, 14 MAY 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

AL DIA – Monday, May 14, 2007, San José, Costa Rica.

Neighbours from the San Juan plea for help

There are more soldiers now at the Northern border with Nicaragua

Communities lack electricity, drinking water and access roads

Río San Juan – Here, nobody understands about law, or trials, but they do know they need to fix the roads, and get medical care, drinking water and electricity. "Of course, over there you've got everything. Here we are almost 50 years behind", said 74 year-old Eduardo Cerdas, of the border town of Cureña, next to the San Juan River.

123 days after Sandinista Daniel Ortega came to power in Nicaragua, the situation has become more stringent. Not even priests are able to say mass in the Costa Rican villages on the river margin, because they are charged US$25 (¢ 13 thousand) every time they pass.

On August 29 of last year, Costa Rica instituted proceedings against Nicaragua before the International Court of Justice (ICJ) in The Hague, Holland, to assure free navigation on the river.

Last December, it was announced that the period required for the proceedings could be shortened from four to two years. The cost of the proceedings, estimated in ¢800 millions could also be reduced.

Plenty of Needs

"We could go fishing before, but not now. If we get caught, they confiscate our boats and we could even be sent to jail in San Carlos de Nicaragua", added Cerdas.

He is the oldest inhabitant in Cureña, a community with more than 40 families that survive on the banks of the San Juan.

Last Friday, Cerdas commented that before they could sell a cow or a pig on the Nicaraguan side, but now it has been prohibited.

Nicaraguan military boats travel up and down the river once or twice a week, precisely to stop fishing or illegal navigation in the river.

"Here we have a rural life style, more than 50 years behind in comparison with the things you have in San José, but it is worse on the Nicaraguan side", said Cerdas.

Nocturnal Complicity.

In Cureña, nights act as accomplice to go fishing for shrimp and fish.

People here fish to take food to their families and also to sell their catch in bars, where shrimp is paid at ¢7.500 per kilo.

Some of the money they earn is used in fuel for their boats and the other part is used to buy groceries. Nobody pays for water or electricity because they do not have those services here.

Jarmir Aguilar, who lives in Cureña, is a tenth grader from Boca de San Carlos. She must cross the river to go to school. "If you are not seen on the other side, you will not have any problems", said the girl.

At 5 p.m. no one can move in the San Juan. None of the ticos, except if it is a medical emergency.

Adrián Lizano, who has been residing in Cureña for the last eight months, grows yams for a living. "Things are difficult when fishing is not allowed", he said.

Lizano remembered the day when he urgently had to take his sick wife to the nearest hospital, but he could not cross the river because he forgot the "zarpe" (a navigation permit for ticos in the San Juan).

"It all depends on the mood of the militaries. If they are in a good mood they will let you pass", he said.

A Vision for Tourism

In Boca de San Carlos, the tension is the same. You must have your papers on hand, or you will not be able to go anywhere.

María Dávila, a small entrepreneuse, only asks for a better access to the zone. She went through a lot of trouble to remodel her house to receive tourists, but she feels the Government has abandoned her.

To reach Boca de San Carlos you must travel more than 60 kilometres from Pital, along roads of gravel and mud.

"There has been no business activity in 15 days and you have to make ends meet. Nobody comes here", commented Dávila.

While Dávila waits for someone to listen to her needs, lawyers make copies, prepare pleas and travel to Holland.

The residents of the banks of the San Juan say their needs are inside the wooden houses and in their stomachs, but nobody wants to realize that. With the ¢800 millions of the proceedings: How many things could be done here?

A LONG STORY

June, 1998

The dispute started when the government of Arnoldo Alemán, invoking reasons of sovereignty, prohibited armed navigation of Costa Rican boats along the river.

October 1, 2005

The Nicaraguan Army took their military tanks out into the streets of Managua, two days after military presence in the San Juan River was increased to keep Costa Rican policemen from navigating the river armed.

August 29, 2006

Costa Rica took the case to the International Court of Justice (ICJ) in The Hague, Holland, to guarantee their right of free navigation in the San Juan of Nicaragua River.

ONE YEAR WITHOUT MASS

It has been a year since Father Mario Chavarría, from Pital de San Carlos, last visited the Costa Rican communities on the banks of the San Juan River, because every time he visited the area he had to pay US$25 (¢13 thousand).

"It has been a year since I last visited that area. On my last visit, an Immigration official told me I could pass, but that I would have to pay on my next visit", said Chavarría. More than 40 families there cannot receive mass, and on Sundays, they must leave their homes very early to hear the word of God.

They were the first

"We were the first to reach those communities because nobody visited those places. What we did was to give mass in Boca de San Carlos at 11 a.m., so people could go up there, because at 5 p.m. no one is allowed to navigate the river", he said. Chavarría explained he took the case to the Pastoral Office of Ciudad Quesada, to see if they could reach an agreement.

The idea is that these communities can receive the Eucharist. "It is very important, specially for the children of the zone, that should learn about God's message and attend mass", said the priest.

Chavarría commented they do not stay in the area very long, and that they would need is a sort of permit to celebrate mass. "I hope this situation will be solved and that these communities will be able to hear and learn from the word of God", explained the prelate.

PEOPLE ARE AFRAID TO PASS

Rafael Palacios has lived for 10 years in Medio Queso, in Los Chiles de Upala. He takes people down the river in his boat. "If anyone asks me to go up to the San Juan I say no, I will not take any chances", said Palacios. He claims that when Daniel Ortega came to power, surveillance in the San Juan River has been strengthened. "Now there are more soldiers with fast boats. If they see you in the river, they will catch you faster", said Palacios.

Along that small affluent of Medio Queso, he goes up 500 meters from the Nicaraguan post. He does not go any further.

"One cannot take any chances. They can confiscate your boat and even take you to jail to San Carlos de Nicaragua. You must even pay a fine for trespassing the border", said Palacios.

It used to be easier before

Things were easier before, he said. You could take a chance and even go to the Nicaraguan post to ask for a permit.

"Now you cannot even do that. The situation is very difficult. It is better to stay here, and avoid getting into bigger problems", he said. Medio Queso is a zone that is widely used by Nicaraguans to enter into Costa Rica without a permit. Most of them come by boat.

From there they go to Los Chiles de Upala. Some four kilometres down the road there is a car waiting to take them to San José or San Carlos.

FROM 5 IN THE MORNING TO 5 IN THE AFTERNOON

Jorge Cerdas sails peacefully down the San Juan River. However he cannot fish or take out any shrimp.

He lives in the community of Cureña and has been affected because the health services do not reach there any more, nor can the priest go there to celebrate mass. He even waited to get help from the IMAS (Joint Social Assistance Institute), but they told him they could not visit the area until the situation with the river has been solved.

Cerdas makes a living selling cheese and raising pigs. He has five children. "We do not have problems with Nicaraguan authorities here. All we need are papers to navigate the river, that's all", he said. There are more problems on this side, without electricity, water and roads to take the products to Boca de San Carlos or even to other places.

"All we need is the Government to lend us a hand. We do not want anything for free, but rather that they give us some opportunities to get by with our families", he said.

Annex 60

"US$34 FEE MARKS THE END OF LOCAL TOURISM" IN *LA NACIÓN*, SAN JOSÉ, 10 JUNE 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

LA NACION – Sunday, June 10, 2007

$ 34 fee marks the end of local tourism

Until a year ago, hundreds of tourists rented boats in Puerto Viejo de Sarapiquí to go to the San Juan River, and after paying US$7 at the Nicaraguan army post, they would head on to Tortuguero or Barra del Colorado.

No one complained about that fee they had to pay to go to the villages on Costa Rican territory.

But that situation changed drastically overnight, and had immediate effects.

According to Pablo Hernández, a local boatman, "Tourists are now an endangered species" in this zone.

The reason is financially simple. For the last year, Nicaragua has been charging US$25 for a visa plus another US$9 for a "right of passage" along the San Juan.

The results: Now almost no one visits this border zone, a popular tourist destination for its incomparable natural beauty.

Many have been affected. "We are going bankrupt. I used to transport tourists even four times a month and now I hardly do it once a month. Nobody wants to go to the San Juan because they must pay a lot of money", complains Pablo Hernández.

He says the drop in tourism also affects small entrepreneurs with cabins and restaurants along the Sarapiquí River, particularly those that are closer to the San Juan River, where nobody wants to go.

"I can assure you this town is dying ever since they started charging that US$34. This is outrageous because you must pay to go to Costa Rican towns", said the owner of some of those cabins.

Small farmers that must navigate the San Juan almost every day, and are not required to pay that fee, are not happy either. "There are towns by the San Juan where doctors and the Red Cross cannot go because they have to pay all that money", they say.

Police officers stationed at the mouth of the Sarapiquí have been ordered not to go near the San Juan to "avoid any incidents" and they follow orders to the letter.

"We don't go near that place; God forbid!, that would be a big problem. We know they charge a lot of money, even to Costa Rican paramedics and doctors; but that situation should be handled by others, not us", said officer Santiago Díaz.

Only very few visitors come here, for now, and most of them turn back because they refuse to pay the US$34 fee.

Annex 61

"THE SAN JUAN RIVER SHOULD BE MILITARIZED" IN *EL NUEVO DIARIO*, MANAGUA, 7 OCTOBER 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

EL NUEVO DIARIO – Managua, Nicaragua – Sunday, October 7, 2007

"The San Juan River should be militarized"

Congressman Enrique Quiñónez, recommends to detach police and army posts and even open a military school to have sovereign presence in the territory.

Congressman Enrique Quiñónez, of the Constitutional Liberal Party, PLC, wants a military training school of the Nicaraguan army to operate along the San Juan River as an irrefutable sign that the river belongs to Nicaragua and to stop Costa Ricans from using that waterway for tourist activities.

The statements made by the Liberal legislator came when President Daniel Ortega announced his intentions to withdraw the case on the dispute for the river from The Hague and reach an extrajudicial agreement with Costa Rica.

Ortega said he had a conversation with his Costa Rican counterpart, Oscar Arias, about that possibility and added this would be the most reasonable thing to do in order to save the money required for a case in the International Court of Justice and to release the tension in the relations between both countries.

Concerning this matter, Quiñónez said "many times Costa Ricans abuse their navigation rights and navigate the river armed and profit from tourism, something not even Nicaraguans have done."

The PLC Congressman, President of the Committee of the Interior of the National Congress, said this is a very simple situation. "I have always stated we should detach two strong police and army posts and even open a military training school and then just wait and see if any tourists will visit that zone with our soldiers practicing in their own territory."

According to the PLC politician, one thing is that Costa Ricans are allowed to navigate for the purpose of commerce and another that they aim to do it armed. This is not permitted and it should not cause any disputes.

"I have always said we want to see our army there, as a sign of sovereignty and by no means is it an aggression because it is our territory and we can have training commandos. Maybe Costa Rican and other foreign tourists will enjoy seeing how our soldiers train in the river", said Quiñónez.

Annex 62

"HEALTH AUTHORITIES WATCH THE NORTHERN BORDER FOR LEPTOSPIROSIS" IN *LA NACIÓN*, SAN JOSÉ, 30 OCTOBER 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

LA NACION – Costa Rica, Tuesday, October 30, 2007

Outbreak in Nicaragua.

Health authorities watch the northern border for leptospirosis

Although there is no impending danger for the country of an outbreak of leptospirosis that has caused nine deaths in Nicaragua, the Ministry of Health keeps watch on the northern border.

María Luisa Ávila Agüero, Minister of Health, said there are no outbreaks of the disease
in the northern zone of the country.

Leptospirosis is a disease caused by exposure to a bacteria called leptospira, which is found in warm climates in water that has been contaminated with the urine of animals, like rats.

According to news agencies, in several Nicaraguan communities the number of people that could have been infected with leptospirosis went from 743 to 1,490.

The infection has occurred in places like Managua, Estelí, Nueva Segovia, Chontales, Granada, and the northern Caribbean.

The Minister clarified that this disease is not spread from person to person, which means there is no risk of an outspread in the country for that reason.

Annex 63

TABLA PARA FACILITAR LA ELECCIÓN DE LOS DIPUTADOS A CORTES, 28 JULY 1820

SOURCE: ARCHIVO NACIONAL DE COSTA RICA

TABLA PARA FACILITAR LA ELECCION DE LOS DIPUTADOS DE CORTES,

Suplentes y de Provincia de Leon y Cartago.

La Ciudad de Leon Capital de Provincia tiene siete partidos Leon, Granada, Realejo, Sutiaba, Segobia, Matagalpa, y Nicaragua.

Partidos.	*Parroquias.*	*Compr.*	*E. Pan.*	*E. Part.*	*D. Cort.*	*Sup.*	*D. Prov.*	*Sup.*
Leon.	Sagrario	31	11	1			1	1
	Somotillo	11	1					
	Metapa	31	4					
	Nagarote	11	1					
Granada.	Ciudad de Granada.	31	7	1			1	1
	Masaya	31	5					
	Managua	31	6					
	Acoyapa.	21	2					
	Niodiri	11	1					
	Diria	9	1					
	Dirtiome	6						
	Niquinohomo	21	2					
	Masatepe	21	2					
	Jinotepe.	9	1					
	Nandayme.	11	1					
	Ometepet.	11	1					
Realejo.	Realejo	5	2	1	1	1	1	
	Viejo	21						
	Chinandega	31	3					
Sutiaba.	Sutiaba	31	4	1				
	Telica.	11	1					
	Posoltega	11	1					
Segovia.	La ciudad.	6	3	1			1	
	Esteli.	21						
	Jicaro.	11	1					
	Tepesomoto.	1	1					
	Palacaguina.	21	2					
Matagalpa.	Matagalpa.	31	8	1			1	
	Teustep.	31	7					
Nicaragua.	Nicaragua.	31	10	1				
	S. Jorge	4						
	Cartago Capital de Provincia tiene dos Partidos Cartago y Nicoya							
Cartago	Cartago.	31	9	4	1		1	1
	Villanueva	31	8					
	Ujarraz.	9	1					
	Villa vieja.	31	9					
	Esparza.	21	2					
	Barba.	9	1					
	Cot. Quircot. Tobosi Quirradabat. Aserrit	11	1					
Nicoya	Nicoya.	11	3	1			1	

Annex 64

NICOYA ACT, 25 JULY 1824
SOURCE: ARCHIVO NACIONAL DE COSTA RICA.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

ACT OF AGGREGATION OF THE PEOPLE OF NICOYA WITH COSTA RICA

In the Town of Nicoya, on twenty five July, eighteen hundred twenty four, and this council being together and congregated in the presence of the presiding Political Chief and all the citizens under his command, with the consent of the citizens, Sergeant and Corporals, and other soldiers and military chiefs and other townsfolk:

The Summons sent to this Municipality by the Government of Costa Rica was read textually, by which these towns are fraternally invited to spontaneously deliberate about union and aggregation, for which this council, by common consent of the other citizens, has deliberated freely about the aforementioned union analyzing the advantages this would bring for commerce through the Port of Puntarenas (Punta de Arenas), the fast dispensation of justice and encouragement of branches; the safety, quietude, and political regime existing, the demarcation of that State as set up by Nature and as required by public convenience, the compatibility of interests and other relations that join this district:

For the aforementioned considerations and the improvements that will result to the advantage of these towns by reason of the confederation of the state of Costa Rica to the rest of Central America, according to the enclosed authorized copy of the Decree, and the immediate and reciprocal participation in the benefits and progress that can be seen in the state of Costa Rica:

This council by unanimous agreement and jointly with its fellow townspeople, pursuant to this matter, also invited the Municipality of the town of Santa Cruz, of this same district, who having summoned the majority of townspeople, expressed the same opinion in response to the enclosed official note.

As a result, and considering the current indigent situation of the towns that belong to this district, as of this date (except Guanacaste) we consider ourselves as an integral part of the state of Costa Rica. In order to solve the lack of money to cover basic needs and while the corresponding tribunals fix the amounts to be allocated; tobacco warehouses should operate in this town as well as in Santa Cruz, after going through the usual formalities, using their proceeds to help in case of any event or disturbance. The towns of this district should get funds to create schools for the education and learning of young people. State tribunals shall fix, establish, and dictate the corresponding provisions for the allocation of the funds required for our protection.

Being the Military Chiefs of this district present in this Municipality, they said that in order to ensure there will be no disturbances in the free integration of this district to the state of Costa Rica, they are in a deplorable situation, without weapons and without sufficient funds to carry out their duties, because there are only twenty guns in bad condition. Therefore, it will be very necessary that the state appoints and designates the forces that will aid and protect us as an integral part of the same, to face the conspiracies and strife of the Province of Nicaragua, by whom we might be caught unaware, since we are now legitimately integrated to the government of Costa Rica, pursuant to this Act which has been solemnly formalized in the presence of the whole town and their military authorities. In witness whereof, all the members of the council, citizens, compatriots, and military authorities sign this document on the date mentioned above. We make a true certification to be submitted to the state of Costa Rica through the undersigned Secretary, all of with we certify:

MANUEL BRICEÑO – TORIBIO VIALES – UBALDO MARTINEZ – MANUEL GARCIA (REGIDORES) – ANTONIO BRICEÑO, 1st SARGEANT – ROQUE ROSALES 2nd SARGEANT, for me and Sargeant José Maria Jaen – SATURNINO GUTIÉRREZ – BLAS FELIZ ROJERIGUEZ – on behalf of Corporal Agustín Briceño – JUAN FELIPE GUTIERREZ – FELIPE MEDINA – MANUEL SOBENES – DECIDENIO DINANTE – SEVASTIAN GOMES – MOJON TORIBIO VIALES – Before me: JUAN FELIPE GUTIERREZ (3. SECRETARY)."z

Annex 65

NICARAGUAN CONSTITUTION, ARTICLE II, 8 APRIL 1826

SOURCE: P. PÉREZ ZELEDÓN, *REPLY TO THE ARGUMENT OF NICARAGUA ON THE QUESTION OF THE VALIDITY OR NULLITY TO THE TREATY OF LIMITS OF APRIL 15, 1858* (WASHINGTON: GIBSON BROS., 1887), PP. 107-109

REPLY

TO THE

ARGUMENT OF NICARAGUA

ON THE

QUESTION OF THE VALIDITY OR NULLITY OF THE TREATY OF LIMITS OF APRIL 15, 1858,

TO BE DECIDED BY

The President of the United States of America.

AS ARBITRATOR.

FILED ON BEHALF OF THE GOVERNMENT OF COSTA RICA

BY

PEDRO PÉREZ ZELEDÓN,

ITS ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY
IN THE UNITED STATES.

(TRANSLATED INTO ENGLISH BY J. I. RODRIGUEZ.)

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1887.

No. 5.

Extracts from the Constitution of the State of Nicaragua of April 8, 1826, showing that at that time the District of Guanacaste or Nicoya was not an integral part of the State, but had been, by its own will, and with the sanction of the Federal Power, annexed to the bordering State of Costa Rica.

In the presence of God, the Author and Supreme Legislator of the Universe:

We, the Representatives of the people of Nicaragua in Constituent Assembly convened, being fully and lawfully authorized *by our constituents*, and by the Federal Compact of the Republic, to enact an organic law which may secure the prosperity and happiness of the State, consisting in the perfect enjoyment of the rights of man and citizen, namely, liberty, equality, safety, and property, have hereby decreed and sanctioned the following political Constitution:

Title First.

Of the State, its Territory, its Rights, and its Duties.

Chapter I.

Of the State and its Territory.

Article 1. The State shall retain the name of State of Nicaragua. It consists of all its inhabitants; and it forms part of the Central American Confederation.

Article II. The territory of the State embraces the Districts of Nicaragua, Granada, Managua, Masaya, Matagalpa, Segovia, Leon, Subtiaba, and El Realejo.[1]

Its limits are: On the east, the Sea of the Antilles; on the north, the State of Honduras; on the west, the Gulf of Conchagua; on the south, the Pacific Ocean; and on the southeast, the free State of Costa Rica.

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[1] The District of Nicoya was not named in this description. It had been segregated from Nicaragua and incorporated into Costa Rica two years before.

ARTICLE III. THE ABOVE-NAMED TERRITORY SHALL BE DIVIDED into Departments, and a special law, providing for the number and limits thereof, shall be enacted.

* * * * * *

ARTICLE CLXVIII. The present Constitution is solemnly sanctioned by this Constituent Assembly.

Given in the City of Leon, on April 8th, 1826.

MANUEL MENDOZA,
Deputy for Matagalpa, President.
ISIDRO REYES,
Deputy for Leon, Vice-President.
PEDRO MUÑOZ,
Deputy for Nicaragua.
RAMON PACHECO,
Deputy for Subtiaba.
GREGORIO PARRAS,
Deputy for El Realejo.
SILVESTRE SELVA,
Deputy for Granada.
FRANCISCO REÑASCO,
Deputy for Masaya.
JUAN JOSÉ ZAVALA,
Deputy for Managua.
JOSÉ VICENTE MORALES,
Deputy (substitute) for Leon.
JUAN MANUEL ZAMORA,
Deputy for Masaya.
FRANCISCO PARRALES,
Deputy for Nicaragua, Secretary.
SEBASTIAN ESCOVAR,
Deputy for Granada, Secretary.[1]

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[1] As was natural and logical Nicoya was not represented in the Constituent Assembly of Nicaragua.

Leon, *April* 22, 1826.

Let it be executed.

Given under my hand, sealed with the seal of the State and countersigned by the Secretary in charge, *ad interim*, of all the Departments of the Government.

JOSÉ MIGUEL de la QUADRA.
JUAN ARGÜELLO,
Secretary.

Annex 66

F. BELLY, *A TRAVERS L'AMÉRIQUE CENTRALE : LE NICARAGUA ET LE CANAL INTEROCÉANIQUE*, TOME SECOND (PARIS : LIBRAIRIE DE LA SUISSE ROMANDE, 1867), PP. 150-165

A TRAVERS
L'AMÉRIQUE CENTRALE

LE NICARAGUA
ET LE CANAL INTEROCÉANIQUE

Par Félix BELLY

PUBLIÉ AVEC UNE CARTE ORIGINALE DU NICARAGUA
DRESSÉE PAR ORDRE DE S. E. LE CAPITAINE-GÉNÉRAL DON TOMAS MARTINEZ
PRÉSIDENT DE LA RÉPUBLIQUE

> Hic locus est gemini janua vasta maris.
> (Ovide.)

TOME SECOND

PARIS
LIBRAIRIE DE LA SUISSE ROMANDE
33, RUE DE SEINE
CHEZ L'AUTEUR, 6, RUE GRANGE-BATELIÈRE

1867

éclatante en faveur de l'union défensive, et par contre en faveur de l'œuvre qui assurait le salut commun. C'était le meilleur moyen de frapper de déchéance morale le traité Cass-Irizarri, s'il était ratifié, et de prouver à l'Europe que ces petits États méritaient de vivre. Qu'on juge de l'effet produit par cette heureuse combinaison si elle avait été réalisée! quelle autorité ne devait pas acquérir un contrat qui aurait obtenu la consécration de cinq gouvernements! Quelle meilleure recommandation pour les solutions politiques invoquées, que le spectacle de l'entente fraternelle qu'elles avaient déjà produite? Les misérables calculs de Paris ont fait avorter cette entente dans le seul moment peut-être où elle était possible. En renonçant, faute de ressources convenables, à agir moi-même, j'ai laissé libre carrière à de funestes influences, à des conseils perfides, à des jalousies intéressées, à l'hostilité partout la même des médiocrités contre les grandes choses. Le traité du Canal s'en est ressenti dès la première heure; et sans la fermeté du général Martinez, dont l'honneur était engagé à son maintien, il aurait été emporté, l'année suivante, dans un refus de ratification dû à des causes multiples, parmi lesquelles figurait le mauvais vouloir des États qu'il ne m'avait pas été permis de visiter.

IV

Je rentrais un soir à Cartago, après une excursion dans les vallées qui sillonnent les larges versants de l'Irazù, lorsqu'on me remit une lettre du ministre des affaires étrangères apportée par un exprès. M. Nazario Toledo m'apprenait deux événements pouvant renverser toutes mes combinaisons, l'acceptation par le gouvernement de

Nicaragua du traité Cass-Irizarri et l'arrivée à San José du général Jerès et du colonel Negretti, envoyés l'un comme négociateur, l'autre comme médiateur, pour régler une question de limites entre le Nicaragua et Costa-Rica. L'adoption du traité Cass-Irizarri, si elle était positive, ne me permettait plus de compter sur le général Martinez, et elle donnait aux Américains du Nord, si exclusifs dans leurs envahissements, un protectorat légal qui allait devenir un obstacle permanent à toute intervention européenne, même purement industrielle. Ce n'était, heureusement, qu'une fausse alerte. Le président du Nicaragua n'avait pas déserté ainsi la cause sacrée dont il était le plus noble représentant. Mais la nouvelle avait été apportée par les deux plénipotentiaires et elle s'appuyait sur un vote très-réel du congrès nicaraguien. Il en résulta une surexcitation du sentiment national à laquelle je dus prendre part, et qui me donna, malgré moi, une attitude politique que j'aurais évitée avec soin dans toute autre circonstance.

J'avais trouvé, à mon retour, toute la ville de San José occupée des préparatifs d'un bal qui devait avoir lieu en mon honneur, au palais du Gouvernement. M. Mora voulait ainsi combler la mesure des attentions dont il m'avait entouré (1), et peut-être m'offrir une occasion naturelle de m'associer aux protestations de l'opinion. Ce bal semblait fermer la période des deuils publics. Il me permit de constater que le goût et l'élégance sont de toutes les latitudes. Je me serais cru dans une de nos grandes préfectures, si la variété des nuances du teint et la cigarette sur les lèvres des femmes ne m'avaient rappelé l'Amérique espagnole. Il fut suivi d'un souper où le patriotisme éclata par les toasts les plus accentués, et où les discours prononcés, la salle debout et frémissante, et publiés le lendemain par le journal officiel, durent prouver aux Américains du Nord que, même avec le traité Cass-Irizarri, ils n'auraient pas été les maîtres du pays.

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(1) Voici le texte de la notification qui m'en fut faite : « M. le président de la république a disposé de donner un bal au palais du Gouvernement, le mercredi 7 du courant, en votre honneur (dedicado à V.), pour bien témoigner (demostrar), autant que les circonstances le permettent, au distingué défenseur des droits et des intérêts du Centre-Amérique, et spécialement de Costa-Rica, les sympathies et la considération que lui méritent ses honorables antécédents et ses hautes qualités personnelles. *Signé* : NAZARIO TOLEDO. » C'était donc à l'homme et à l'écrivain que s'adressait encore cette dernière manifestation.

C'est à cette fête que je vis pour la première fois le général Maximo Jerès, dont mes lecteurs connaissent déjà la carrière tourmentée et inconséquente. La question des limites qui l'amenait à Costa-Rica, au moment où on s'y attendait le moins et où tout était décidé pour le départ du président, était au moins une complication. Controversée depuis trente ans, cette question avait failli plusieurs fois mettre les armes à la main aux deux républiques, et elle était la cause principale de leur mésintelligence traditionnelle. Le Nicaragua réclamait dans le principe, comme lui appartenant, toute la province de Guanacaste qui s'était donnée volontairement à Costa-Rica dès l'année 1824. L'annexion avait été approuvée par le congrès fédéral, sous la réserve des frontières à fixer pour chaque État. Mais comme les révolutions qui sapaient l'édifice de la fédération n'avaient pas permis de fixer ces frontières, le Guanacaste s'en était passé. Ses habitants avaient plusieurs fois renouvelé leur vote d'union, et depuis la proclamation de l'indépendance ils faisaient partie de la famille costaricienne. Quelles prétentions théoriques pouvaient contrebalancer des faits aussi concluants? Le Nicaragua avait fini par le comprendre, et les propositions nouvelles du général Jerès ne revendiquaient plus tout entier le district de Moracia; elles se présentaient comme une transaction, laissant l'intérieur du district à Costa-Rica et ne lui enlevaut que sa bordure. Toutefois cette transaction même portait l'empreinte de la jalousie étroite et invétérée qui l'avait dictée. Le Nicaragua refusait à Costa-Rica toute issue sur le lac et sur le fleuve, division naturelle des deux pays, jusqu'à trois milles au-dessous du fort Castillo. Il oubliait que, sans la présence des forces costa-riciennes dans les eaux du fleuve et du lac, il serait encore au pouvoir de Walker. Un pareil arrangement n'avait en lui-même aucune chance de succès, et l'intervention du médiateur salvadorien n'était pas faite pour lui en donner. La mission du général Jerès ouvrait donc de nouveau un débat irritant sans conclusion possible, et remettait même en question tout ce qui avait été décidé depuis huit jours, y compris le déplacement de M. Mora.

Ce fut le traité du Canal qui dégagea cette situation embarrassée. L'article 4 faisait du canal lui-même la limite définitive des deux États dans le cas où le tracé adopté déboucherait sur le Pacifique dans la baie de Salinas. Or le président, qui connaissait le pays, qui l'avait parcouru dans tous les sens, qui possédait même une mine de houille et une mine de cuivre dans les environs de la baie, ne doutait pas que ce passage ne fût praticable. Un géomètre allemand, envoyé sur les lieux, en avait rapporté des nivellements et un tracé de route terrestre dont les hauteurs confirmaient les études antérieures. La solution proposée par l'article 4 du traité du Canal semblait donc au président Mora devoir être la solution de l'avenir, et comme cette solution réparait les iniquités et les ingratitudes de la proposition Jerès et rendait à Costa-Rica toute la rive droite du fleuve et une issue sur le lac, peu importait qu'on fît un sacrifice provisoire, si l'on obtenait un résultat définitif. L'arrangement proposé par le Nicaragua perdait dès lors de son importance en perdant de sa durée. Costa-Rica n'abandonnait plus, en le signant, les droits qu'il avait toujours maintenus. Ce n'était qu'une concession apparente qui devait faciliter les négociations ultérieures. Il ne s'agissait, pour tout sauver, que d'introduire dans la nouvelle convention de limites une réserve générale en faveur des obligations consignées dans les contrats présents ou futurs de canalisation. Cette considération l'emporta dans l'esprit de M. Mora sur les impressions fâcheuses qu'il avait d'abord éprouvées. Son plan fut dès lors tout tracé. Il accueillit les envoyés du Nicaragua et du San Salvador avec toutes les marques extérieures d'entente cordiale, et livra leurs propositions à la délibération du Congrès, sûr qu'il en sortirait pour lui une force nouvelle dont il pourrait user à Rivas.

Seulement le voyage projeté se trouva, par le fait même, singulièrement élargi dans son but. Il comportait l'idée d'une espèce de dictature morale allant résoudre, sur le sol du Nicaragua, toutes les difficultés de la situation. C'est ainsi qu'il fut annoncé par une proclamation insérée le 15 avril dans le journal officiel; et lorsque le surlendemain le cortége se mit en route pour Puntarénas, si le traité Cass-Irizarri m'inspirait encore quelques inquiétudes, les pouvoirs donnés à M. Mora par le Congrès et l'attitude décidée de son peuple, ne me permettait pas de craindre un échec. J'avais entendu discuter froidement la résolution de ne livrer San José qu'en cendres, comme Moscou, à commencer par le palais national.

Nous devions quitter San José le 17 avril. Un dé[illegible] investi M. Escalante de l'*intérim* présidentiel. Le public était averti et les préparatifs étaient faits; mais il s'était produit la veille, au sein du Congrès, une explosion de mécontentements qui semblait devoir tout compromettre. Il s'agissait de la troisième lecture et de l'acceptation définitive du traité de limites sur les bases de la proposition Jerès. Les sacrifices que faisait Costa-Rica à un intérêt supérieur avaient paru exorbitants. Le bruit s'était même répandu que le gouvernement se ralliait à cette opposition, et en faisait un des ressorts de sa politique vis-à-vis du Nicaragua. Beaucoup de gens en concluaient que M. Mora n'avait pris encore aucun parti, et que le voyage pourrait bien ne pas avoir lieu. Toute la journée du 16 s'était passée dans ces incertitudes, dont, plus que tout autre, je suivais les oscillations avec anxiété. Le soir, on m'assura que le général Jerès, très-inquiet de ces présages, avait fait une démarche suprême auprès du président, et qu'il l'avait ramené à sa première résolution. Le président avait donc insisté pour le vote immédiat; mais le Congrès ne pouvait se décider à cette trahison apparente. Des voix patriotiques avaient réclamé le maintien des prétentions de Costa-Rica sur la rive droite du San Juan et sur la côte méridionale du lac, et ce n'était qu'à dix heures du soir, après une séance orageuse qui durait depuis deux jours, que le traité avait été ratifié. Encore n'avait-il pu réunir que sept voix contre cinq, — juste la majorité légale, — ce qui ne s'était jamais vu depuis l'avénement de M. Mora à la présidence.

Le matin même du 17, je ne savais donc trop encore si le départ aurait lieu quand on vint me prévenir que le président montait à cheval avec son état-major, et que le rendez-vous était fixé sur le bord d'une jolie rivière qui coule au fond d'un ravin, à une demi-lieue de San José. Je trouvai en effet tout le cortége arrêté sur un versant du ravin. M. Mora portait un *poncho* très-élégant et un panama de prix; mais rien ne le distinguait des autres cavaliers que des étriers d'argent massif, d'une forme vieille et originale. Autour de lui, ministres, magistrats, députés, semblaient faire assaut de simplicité. On eût dit de bons propriétaires ruraux revenant d'une foire. Les *ponchos* péruviens étaient rares, quoique ce soit le meilleur costume de voyage sur des routes poudreuses. Les militaires ne se distinguaient que par un grand sabre de cavalerie et par un large galon d'or sur un chapeau de feutre gris ; et il y avait parmi eux de véritables attitudes de mousquetaire, grâce à leurs immenses bottes en entonnoir que recouvraient les plis bariolés du *poncho*.

On ne compte que vingt-six lieues françaises de San José à Puntarénas, mais cette distance est quelque chose en Amérique, surtout avec une différence de niveau de 1,500 mètres entre les deux points extrêmes, et il faut deux ou trois jours pour la franchir. Ce ne fut même que le troisième our que commença la descente de l'Aguacate, énorme charpente métallique dont les mines d'or étaient exploitées par l'Etat pour les besoins de son hôtel des monnaies. Nous avions presque constamment aperçu jusqu'alors, à notre droite, le rideau volcanique qui part de Barba pour aboutir à l'Orosi, entre le lac de Nicaragua et la baie de Salinas. Une fois sur le point culminant de l'Aguacate, tout l'espace parcouru s'évanouit derrière un massif de forêts, et un nouvel horizon s'ouvrit devant nous avec une splendeur indescriptible. C'était le golfe de Nicoya, épanchant ses flots bleus dans un bassin de verdure d'une forme ovale très-allongée, avec les pitons de la Herradura pour barrière au sud, une presqu'île montagneuse à l'ouest, et au delà, l'Océan sans fin, uni et miroitant comme un cristal. Les derniers échelons de l'Aguacate allaient se fondre dans une délicieuse plaine traversée par plusieurs rivières, et qui était elle-même un océan de verdure. J'avoue que l'idée ne me vint pas d'aller visiter les mines d'or. La beauté lumineuse de ce panorama, au bout duquel on distinguait vaguement le groupe de Puntarénas et plusieurs bâtiments à l'ancre, m'avait fait oublier tout le reste.

Jusque-là, nous n'avions traversé que des villages isolés ou des stations solitaires, dont l'une est devenue la jolie ville d'Atenas. Au pied de l'Aguacate, nous devions retrouver la population et le mouvement. Esparza s'était pavoisée et avait préparé ses canons pour recevoir le président. Les drapeaux français n'y manquaient pas plus qu'à Alajuela, mais un détail de la route me fit trouver cette dernière étape ravissante. A peine avions-nous marché une lieue au delà d'Esparza, à travers des bois de mimosas, de palmiers et d'ébéniers, que nous arrivâmes devant de grands bâtiments construits au-dessus de la plus gracieuse rivière. Il y avait là tout un petit monde industriel : une scierie mécanique, une vaste exploitation de bois et un petit chemin de fer, le tout dirigé par quelques Anglais. Le chemin de fer allait jusqu'à Puntarénas, en ligne droite comme le sillon d'une flèche, à travers les arbres pressés d'une forêt vierge étonnée de cet hôte nouveau. Rien de plus modeste et de plus primitif que l'installation de cette voie. Pas de gare, pas de stations, pas d'employés spéciaux; une trouée de 2 mètres de large et de trois lieues de long dans la forêt, deux rails posés sur des troncs d'arbres non dégrossis, quelques petits ponts de bois dont les planches n'étaient point ajustées, et une demi-douzaine de voitures-omnibus, simplement garnies de bancs et couvertes d'un toit de bois vernis. Les besoins du service n'exigeaient pas la locomotive; car ce tronçon sans issue ne pouvait compter sur une grande circulation de voyageurs. Il ne servait, en dehors de l'exploitation forestière dont il était le débouché, qu'à des trains de plaisir ou de chasse. On y pouvait tirer le chevreuil sans descendre de l'omnibus.

Ce premier essai de voies ferrées n'avait alors d'autre analogue le long de la côte occidentale de l'Amérique que le railway jeté, sur un parcours de deux lieues, entre le Callao et Lima. M. Mora en avait accordé trois ans auparavant le privilège à une association anglaise, dans l'espérance de l'encourager à pousser son œuvre jusqu'à San José, si l'ascension de l'Aguacate ne présentait pas des obstacles invincibles. La configuration du sol, exigeant des rachats de pente de plus de 5 p. 100, n'avait pas permis aux concessionnaires d'arriver même jusqu'à Esparza. Leur établissement a disparu un jour, après la mort de M. Mora, faute peut-être de rendement suffisant, et j'ai eu le regret de repasser depuis par le même chemin sans y retrouver la pittoresque installation qui m'avait semblé si prospère.

Nous avions pris place, un peu au hasard, dans des omnibus pavoisés et traînés par un cheval. La traversée de la forêt ressemblait à celle d'un tunnel étroit à parois de feuillages. La mer étincelait à l'orifice. Un air balsamique nous pénétrait, et la chaleur se sentait à peine sous ces voûtes d'ombre. De temps en temps, des coups de fusil tirés en l'air et de grands drapeaux tricolores dressés sur de petites maisons de bois nous faisaient souvenir de la présence d'un gouvernement. Nous entrâmes ainsi à Puntarénas, au bruit de l'artillerie, à travers une population en fête, des maisons décorées, des vivat retentissants, et tout l'appareil des réceptions officielles. Il y avait onze bâtiments en rade, tous couverts de leurs couleurs et répondant par leurs salves aux salves du port. Un de ces navires, le *Saint-Vincent-de-Paul*, véritable frégate de commerce, de 3,000 tonneaux, me fournit les moyens de ne pas rester complètement étranger à ces réjouissances.

Le capitaine de ce navire, M. Cazalis, s'était trouvé à San José au milieu des démonstrations dont j'avais été l'objet, et, comme tous les Français établis dans le pays (1),

(1) Il y a un certain nombre de Français établis à San José ou dans les environs, tous à leur aise, pour ne pas dire tous riches. Rien, du reste, n'est plus facile que de gagner de l'argent à Costa-Rica, quand on sait un métier quelconque. Le moindre ouvrier est payé une piastre par jour. Un domestique qu'on ne nourrit pas se paie aussi une piastre, soit 150 fr. par mois. Le commerce ne gagne jamais moins de 400 pour 100, souvent 200 et même 300. Les forgerons,

il était venu m'offrir ses services. Je ne savais comment reconnaître les témoignages de bienveillance et d'estime dont j'avais été comblé par M. Mora. Notre itinéraire, convenu d'abord à travers le Guanacaste, pour explorer en passant l'isthme de Salinas, avait été modifié par l'arrivée des plénipotentiaires; j'eus l'idée de profiter de notre passage forcé à Puntarénas pour répondre à l'hospitalité costaricienne par une hospitalité de quelques heures toute française. M. Cazalis entra dans ces vues. Deux autres bâtiments français se montrèrent ravis de s'associer à une manifestation où le drapeau national flotterait à côté de celui de Costa-Rica. M. Mora avait accepté mon invitation. Toute la ville de Puntarénas prit part à cette fête de fusion internationale. Jamais le golfe profond du vieux cacique Nicoya n'avait assisté à un pareil spectacle : toutes les embarcations à la mer, la musique précédant le canot présidentiel, onze navires pavoisés, le pavillon costa-ricien à tous les mâts de misaine et le canon tonnant de minute en minute. M. Mora fut reçu en souverain à bord du *Saint-Vincent-de-Paul* avec une suite d'une centaine de personnes. Je n'avais pas la prétention de payer ainsi ma dette à l'homme à qui je devais mon succès, mais je lui prouvais du moins qu'il ne dépendrait pas de moi que le pavillon de la France ne fût toujours enlacé à celui de Costa-Rica.

Le jour suivant, sur les six heures du soir, au moment où la brise de terre venait remplacer la brise de mer qui s'élève régulièrement à dix heures du matin, nous longions, les pieds dans le sable, la grande rue de la ville, toute on-

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charrons, charpentiers, modistes, couturières, etc., demandent à peu près ce qu'ils veulent. Le blanchissage se fait au prix courant d'un réal la pièce (62 cent. 1/2), et il se fait mal. Les mécaniciens et les industriels n'ont pas de prix. Un mécanicien de Puntarénas était engagé à raison de 5 piastres par jour (25 fr.), et les ouvriers spéciaux de la distillerie gagnaient de 15 à 20 fr.

doyante de drapeaux, toute frémissante encore des agitations de la veille. Une jeune femme, assise devant sa porte, se leva au passage du président et l'invita à entrer, en l'appelant, avec une familiarité gracieuse, *Don Juanito*. Il y avait d'autres personnes dans la maison, entre autres deux jeunes filles. On apporta des chaises et des guitares. Les femmes s'échelonnèrent sur les marches de l'escalier, et le cercle s'étendit peu à peu. Les vagues toujours murmurantes venaient expirer sur la rive en face de nous. La nuit tombait rapidement, mais une nuit étoilée, presque lumineuse, baignée de phosphorescences et de parfums, et bercée d'harmonies intraduisibles. Une jeune fille se mit à chanter, en s'accompagnant, je ne sais quel air national, mélodie douce et monotone, que j'avais déjà entendue un soir dans une *hacienda*, et que j'ai retrouvée depuis sur les bords du lac de Nicaragua. Les passants s'arrêtaient pour écouter. D'autres chants avaient succédé au premier; d'autres femmes étaient venues saluer M. Mora, en l'appelant toutes de son petit nom de *Juanito*. Il n'y avait plus assez de chaises. M. Mora profita d'un dérangement pour s'asseoir sur la première marche de l'escalier ; et le concert de famille continua jusqu'à onze heures, sans plus de cérémonie, dans une atmosphère de cordialité, de modestie et de bonté qui n'étaient égalées que par la simplicité du chef de l'État.

Lorsque le *Columbus* nous emporta le lendemain vers la haute mer par le cap Blanco qui ferme la baie, les mêmes honneurs accompagnèrent le président dans son passage à travers les navires à l'ancre. Le *Saint-Vincent-de-Paul* et les *Deux-Eulalies* avaient rempli jusqu'au bout la mission qu'ils s'étaient donnée de représenter dignement la France. C'est la seule fois qu'il m'ait été donné d'apercevoir nos couleurs nationales dans les mers centre-américaines, et je puis dire que la présence et la conduite de nos marins avaient provoqué dans la population des sympathies unanimes.

Vingt-quatre heures après, nous jetions l'ancre devant San Juan del Sùr, à un mille au large. Un canot s'était détaché du port et faisait force de rames pour nous accoster. Il nous apportait la nouvelle que le général Martinez était entré à Rivas et qu'il n'avait pas ratifié le traité Cass-Irizarri. Le général se montrait, au contraire, plus décidé que jamais à repousser tout engagement de ce genre à l'égard des Américains. Nature froide, ne se livrant pas facilement, mais cachant un cœur de lion sous des formes austères, il venait d'adresser à ses concitoyens, à la date du 10 avril, une proclamation d'un caractère antique, véritable manifeste d'une nouvelle confédération centre-américaine. Les forces entières de sa pensée semblaient tendre à ce but suprême. Il devait donc prêter les mains à tout ce qui élèverait une barrière contre ses éternels ennemis, à tout ce qui appellerait sur l'Amérique centrale l'attention et le patronage bienveillant de l'Europe. Je ne pouvais arriver plus à propos.

Les deux présidents se rencontrèrent enfin à une demi-lieue de Rivas, où tout leur rappelait de terribles souvenirs. L'entrevue fut simple, presque triste. Pas un sourire n'éclaira la figure des deux hommes qui avaient sauvé leur pays à force d'héroisme, et qui venaient le sauver encore. Deux poignées de main échangées, une présentation mutuelle des personnes de leur suite, quelques paroles brèves et fermes, et rien de plus. On reprit ensuite la route de la ville, où nous attendait une réception plus empressée que brillante. Rivas n'était encore qu'un amas de décombres. Des drapeaux blancs et bleus décoraient ces débris. Une haie de soldats se tenaient l'arme au bras devant une maison trouée de boulets. Le canon tonnait, les clairons sonnaient aux champs; deux ou trois cents personnes étaient accourues au-devant du cortége, et le saluaient de leurs *vivat.* Mais quelque chose de profondément douloureux pesait sur cette scène. L'aspect seul de la maison où nous descendîmes un moment, ancien quartier général de l'armée nationale, en disait plus que toutes les paroles sur l'acharnement de la lutte terminée par la capitulation de Walker. Pas un tronçon de muraille qui ne fût criblé de trous de canonnade ou de mousqueterie. Dans la pièce même où fut signé, huit jours après, le traité du Canal, et qui avait été tour à tour le cabinet de Walker et celui de M. Mora, le mur, fraîchement récrépi, dessinait encore le sillon des boulets; et j'en retrouvai autant au-dessus de mon lit, dans la chambre que m'avait préparée la prévoyante hospitalité d'un Nicaraguien que je n'ai jamais vu, Don Juan Ruiz de Bustamente.

Je touchais donc à cette semaine féconde, commencée le 24 avril et terminée le 1er mai, qui a été pour le Nicaragua, quoi qu'en disent mes détracteurs, le signal des mesures prises par l'Europe pour garantir sa sécurité, et pour les deux républiques riveraines, le point de départ de leur entente définitive. J'avais remarqué, par les attentions qu'il m'avait témoignées en route, que je n'étais pas indifférent au général Martinez. Il avait poussé la courtoisie castillane jusqu'à me reconduire à mon domicile, après avoir installé M. Mora dans le sien. J'allai lui faire une visite pour lui demander ses ordres sur la forme et le lieu des entrevues ultérieures. Je croyais le trouver seul; il avait auprès de lui son ministre de l'intérieur, M. Rosalio Cortez, et le général Bonilla, chef militaire du département de Rivas. Quelques instants après entra le ministre des affaires étrangères, M. Gregorio Juarès; puis le général Jerès et le colonel Negretti, de telle sorte que le gouvernement tout entier du Nicaragua se trouvait rassemblé. Je profitai de l'occasion; et devant ces six personnes, en y comprenant le secrétaire-interprète qui m'avait accompagné, j'abordai de plain-pied la question qui les intéressait tous.

Je débutai par cette phrase catégorique que je copie textuellement et sans y changer un iota, dans la page de mon journal, écrite une heure après : « Je ne voulais laisser planer aucun doute sur ma situation : je ne voulais surtout « usurper aucun honneur officiel. Je n'étais ni ministre, ni « consul, ni agent quelconque de la France. Je n'étais qu'un « simple particulier, et je tenais à établir avant tout cette « position, pour empêcher tout malentendu (1). » Le général Martinez me répondit, en galant homme, que je n'avais pas besoin de caractère public pour être accueilli avec distinction, que c'était ma personne et non mon titre qu'on considérait, et que je pouvais compter sur l'empressement qu'on mettrait à me satisfaire.

J'expliquai alors, avec une égale franchise, l'objet de mon intervention dans les affaires du pays. Je venais réaliser le projet national par excellence, celui qui fermentait dans toutes les têtes intelligentes depuis l'émancipation, celui que toutes les cartes signalaient comme une nécessité de l'avenir. J'avais les pleins pouvoirs d'une maison de banque, l'appui moral des économistes, le concours de l'opinion du monde éclairé. J'apportais ainsi au Nicaragua et à l'isthme entier, non-seulement la richesse, mais la sécurité ; non-seulement l'accomplissement de leurs destinées, mais le patronage puissant des intérêts européens, désormais liés à leur indépendance. Je développai les principes de libéralisme sans réserve sur lesquels reposait le traité préparé, et pour la discussion de ses articles, je me mis à la disposition entière du président, le laissant libre de décider si cette discussion aurait lieu avec lui seul, ou en présence de M. Mora et de son ministre.

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(1) J'étais loin de penser, en écrivant ces notes quotidiennes, par esprit d'ordre et pour me rendre compte à moi-même de mes propres impressions, que j'aurais jamais à leur emprunter une justification contre de honteuses calomnies administratives.

Pendant que je parlais, j'avais pu remarquer sur la figure impassible du général Martinez quelques signes non équivoques de son attention sympathique. Quant à M. Gregorio Juarès, arrivé la veille en toute hâte, il ne déguisait pas la satisfaction profonde qu'il éprouvait. C'était la première fois, depuis bien des années, qu'une parole amie, partie de l'Europe, venait leur ouvrir les horizons splendides que tous appelaient de leurs vœux. J'avais, dans ce rôle, l'immense avantage d'être cru sur parole, car ma loyauté ressortait de la déclaration même que j'avais faite en commençant. Je m'adressais, d'ailleurs, à des hommes préoccupés du lendemain, qui voyaient là une solution politique inattendue. Ce côté politique de la question, cet appel indirect aux sympathies européennes fut la raison déterminante des entraînements que l'idée du canal provoqua. Il explique la fameuse déclaration qui porte, comme le canal, la date patriotique du 1^{er} mai, anniversaire de la capitulation de Rivas. Cette déclaration était contenue implicitement dans la proclamation du général Martinez. C'était le cri désespéré d'un peuple aux abois, qui n'avait plus de ménagements à garder vis-à-vis de ses impitoyables oppresseurs, et qui espérait se faire entendre ainsi du vieux monde imprévoyant et égoïste.

Le lundi 20 avril, s'engagea, en présence des deux présidents, la discussion des articles. J'avais déclaré d'avance que, n'étant pas le juge des relations réciproques des deux États, je me soumettais à toutes les modifications de détail que les deux gouvernements croiraient devoir introduire dans le traité, pourvu que ses principes généraux fussent sauvegardés. La lutte de générosité qui s'établit entre le général Martinez et M. Mora coupa court à ces modifications.

Le débat fut sérieux, il aborda toutes les questions spéciales ; il me permit de développer toutes les conséquences économiques que j'entrevoyais ; mais il se maintint jusqu'au bout dans une sphère élevée où les rivalités locales et les intérêts privés disparaissaient devant l'urgence du salut public. Je n'ai jamais assisté à un spectacle plus consolant que celui de ces deux hommes faisant assaut de sacrifices et de désintéressement pour fonder enfin quelque chose de durable. La solennité des circonstances fortifiait toutes les âmes. Je desire, pour le bonheur de l'humanité, que la diplomatie rencontre souvent de pareilles aspirations. Je fus, quant à moi, profondément touché de tout ce que je vis et de tout ce que j'entendis dans les six jours que durèrent les conférences, et lorsque le général Martinez prit enfin la plume pour apposer sa signature au bas du traité, j'éprouvai une de ces joies profondes qui font date dans une vie. C'était le dernier acte et le couronnement d'une semaine bien remplie, qui avait vu s'aplanir toutes les difficultés pendantes, qui avait réglé honorablement tous les points en litige, qui avait commencé la reconstitution centro-américaine par l'alliance intime de deux États divisés depuis trente ans, et qui laissait après elle un courant d'opinion désormais assez fort pour faire avorter toutes les violences américaines.

Voici le texte du traité, débarrassé du nom compromettant que j'avais d'abord associé au mien, et vierge des mutilations qu'il a subies l'année suivante de la part du congrès du Nicaragua :

Annex 67

(A) "DEPARTURE CLEARANCE CERTIFICATE" ISSUED BY THE COSTA RICAN REVENUE GUARD IN BOCA DEL RÍO SARAPIQUÍ TO A PRIVATE CITIZEN, 16 APRIL 1968
(B) "DEPARTURE CLEARANCE CERTIFICATE" ISSUED BY THE COSTA RICAN REVENUE GUARD IN BOCA DEL RÍO SARAPIQUÍ TO A COSTA RICAN PARK RANGER, 13 JUNE 1968.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

16 April 1968 **No. 39243 R.F.**

REVENUE GUARD OF Boca of Río Sarapiquí (Mouth of the Sarapiquí River)

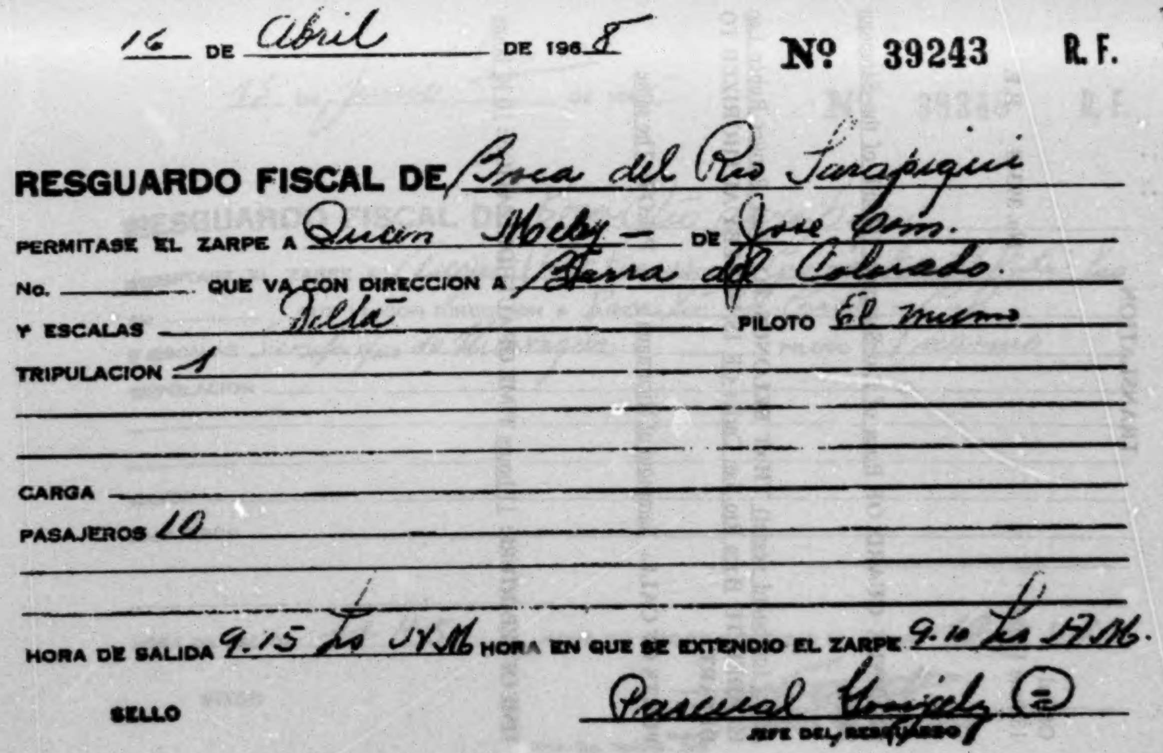
Queen Mety **THAT BELONGS TO** José Com **HEADED TO** Barra del Colorado **IS HEREBY AUTHORIZED TO DEPART.**

PORTS OF CALL: Delta **PILOT:** The same

PASSENGERS: 10

TIME OF DEPARTURE: 9:15 AM **TIME OF AUTHORIZATION:** 9:10 AM

Pascual González
Chief of the Guard



16 DE Abril DE 1968 **Nº 39243** **R. F.**

RESGUARDO FISCAL DE Boca del Río Sarapiquí

PERMITASE EL ZARPE A Quecim Mcby — DE Jose Cam.

No. ______ QUE VA CON DIRECCION A Barra del Colorado.

Y ESCALAS Delta PILOTO El mismo

TRIPULACION 1

CARGA ______

PASAJEROS 10

HORA DE SALIDA 9.15 las A.M. HORA EN QUE SE EXTENDIO EL ZARPE 9.10 las A.M.

SELLO

Pascual González

JEFE DEL RESGUARDO

TRANSLATION

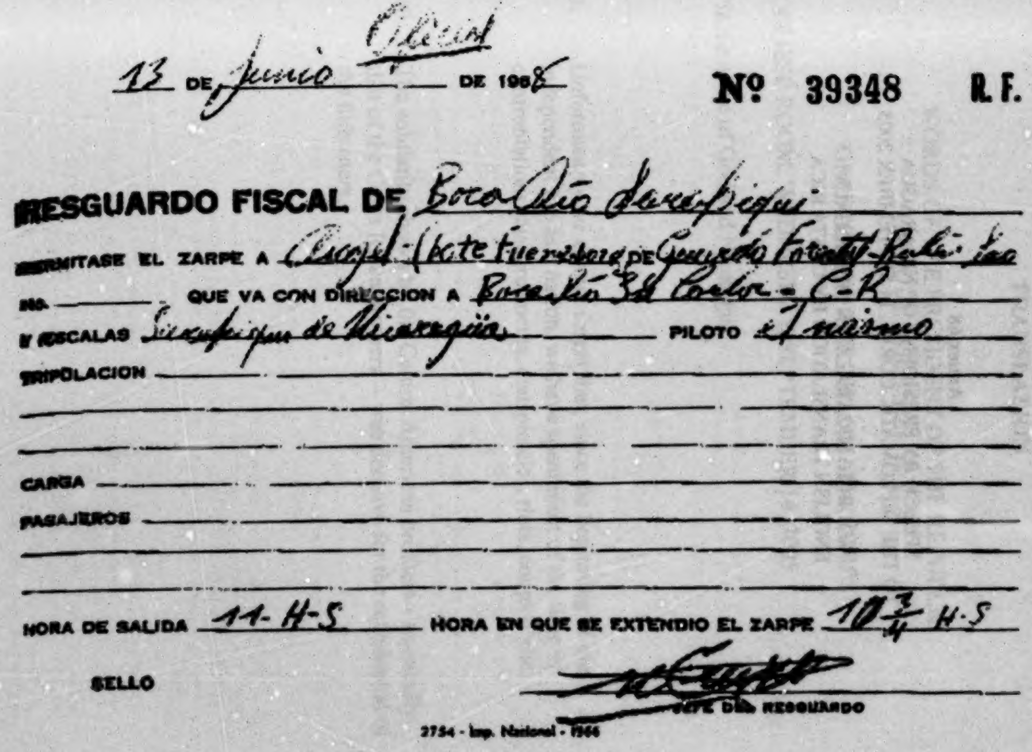
Oficial
13 June 1968 **No. 39348 R.F.**

REVENUE GUARD OF Boca of Río Sarapiquí (Mouth of the Sarapiquí River)

Angel (outboard vessel) **THAT BELONGS TO** Park Ranger Rubén Lao **HEADED TO** Boca Río San Carlos-CR **IS HEREBY AUTHORIZED TO DEPART.**

PORTS OF CALL: Sarapiqui of Nicaragua **PILOT:** The same

TIME OF DEPARTURE: 11 hours **TIME OF AUTHORIZATION:** 10 ¾ hours



Oficial

13 DE Junio DE 1968 **Nº 39348** **R.F.**

RESGUARDO FISCAL DE Boca Río Sarapiquí

PERMITASE EL ZARPE A Ciacyl-(bote fuera borda de Gonzalo [illegible]

No. ______ QUE VA CON DIRECCION A Boca Río San Carlos - C-R

Y ESCALAS Sarapiquí de Nicaragüa PILOTO el mismo

TRIPULACION

CARGA

PASAJEROS

HORA DE SALIDA 11- H-S HORA EN QUE SE EXTENDIO EL ZARPE 10 3/4 H-S

SELLO

JEFE DEL RESGUARDO

2754 - Imp. Nacional - 1966

Annex 68

SPEECH BY PRESIDENT OF NICARAGUA TO THE DIPLOMATIC CORPS, 14 SEPTEMBER 2005

SOURCE: NICARAGUAN PRESIDENCY.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

WORDS OF THE PRESIDENT OF THE REPUBLIC ENRIQUE BOLAÑOS GEYER

GREETING TO THE DIPLOMATIC CORPS

CHINESE ROOM, WEDNESDAY, SEPTEMBER 14, 2005

"In the name of God and Nicaragua

....

3. **Unfortunately we cannot forget that, since the beginning of our independent life as a nation, we have spent most of the time in confrontations, disagreements, conspiracies, riots, coups d'etat.**

...

10. **The solidarity shown by the Central American brothers-- especially that of the Costa Rican brothers -- was decisive for the withdrawal of the filibusters.**

..."

E Bolaños

PALABRAS DEL PRESIDENTE DE LA REPÚBLICA
ENRIQUE BOLAÑOS GEYER
SALUDO AL CUERPO DIPLOMÁTICO 2005
SALÓN CHINO, MIÉRCOLES 14 DE SEPTIEMBRE DEL 2005

En el nombre de Dios y de Nicaragua

1. Todos los años nos damos cita en Septiembre, mes de la unidad y la soberanía para nosotros, para celebrar las Fiestas Patrias.

2. Fiestas, instituidas en celebración del magno acontecimiento de la Independencia de Centroamérica y la lucha heroica del pueblo nicaragüense, ayudado por nuestros hermanos centroamericanos, contra los invasores filibusteros que intentó establecer un Estado de esclavitud en nuestro suelo.

3. Desgraciadamente no podemos dejar de recordar que desde el inicio de nuestra vida independiente como nación, hemos pasado la mayor parte del tiempo en confrontaciones, desacuerdos, conspiraciones, asonadas, golpes de estado.

4. Estimados amigos Diplomáticos: Esta actitud, esta conducta, explica el atraso económico y social que hemos causado de manera tal que todavía luchamos contra problemas que otras naciones ya han definitivamente superado.

5. La Guerra Nacional que sufrimos a mediados del siglo XIX, fue prevista por uno de los próceres más sabios, y de mayor clarividencia política, de nuestra Independencia, don José Cecilio del Valle.

6. Al lamentarse del estado de anarquía que sobrevino en toda la región, como consecuencia del proceso independentista, "Cualquier aventurero", decía, "aprovechando el momento, vendrá a dictarnos leyes, y los pueblos, debilitados, abatidos y desgraciados, no tendrán la energía necesaria para conservar sus derechos y sucumbirán indecorosamente ante la fuerza del poder". (concluyo la cita)

7. Esta conducta tentó a William Walter, quien la aprovechó para apoderarse de Nicaragua, con pretensiones de avanzar a la conquista del resto de Centroamérica

8. De ahí que su lema fuera "Five or none" (cinco o ninguna), frase que se repitió en la década obscura, cuando también el totalitarismo marxista conquista con facilidad a Nicaragua y contamina al resto de la región en su afán de conquista expansionista .

9. Ante la conquista de Walter, los patriotas de nuestras hermanas repúblicas centroamericanas, se unieron a nuestra defensa, para también evitar así la amenaza a sus propios pueblos. A lo interno, también se logró hacer *un pacto*, —¡pacto para salvar la Patria y no para repartirse el poder!

10 La solidaridad de los hermanos centroamericanos —especialmente la de los hermanos costarricenses— fue decisiva para lograr la retirada de los filibusteros

11. Aparte del general José Dolores Estrada, estratega de la Batalla de San Jacinto, aparte de los héroes Andrés Castro y Emmanuel Mongalo, es importante recordar también, el ejemplo del General Tomás Martínez, hombre que no dudó en ningún momento en anteponer sus intereses personales a los intereses sagrados de la Patria

12 No me canso de repetir que fue un hombre cuyo ejemplo subyace en los principios que sustentan al gobierno de la Nueva Era, en su lucha contra la corrupción y la superación de la politiquería intrascendente.

Annex 69

NICARAGUAN PRESIDENTIAL DECREE NO. 65-2005
OF 28 SEPTEMBER 2005

SOURCE: *NICARAGUAN OFFICIAL GAZETTE NO. 188.*
29 SEPTEMBER 2005.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

THE GOVERNMENT OF NICARAGUA WILL NOT ALLOW IN ANY WAY ARMED NAVIGATION OF FOREIGN FORCES IN NICARAGUAN TERRITORIAL WATERS

DECREE No. 65-2005, approved on September 28, 2005

Published in La Gaceta No. 188 of September 29, 2005

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

WHEREAS

I

Article 1 of the Political Constitution of the Republic of Nicaragua states that: "National independence, sovereignty and self-determination, are unrenounceable rights of the people and the foundations of the Nicaraguan nation. Any foreign interference in the internal matters of Nicaragua or any attempt to lessen those rights, are attempts against the life of the people. It is a duty of all Nicaraguans to preserve and protect those rights.

II

Pursuant to article VI of the Border Treaty signed between Nicaragua and Costa Rica on April 15, 1858: "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan, from its outlet from the Lake until it empties on the Atlantic … ";

III

Sovereignty is the fundamental basis on which the international legal system rests.

IV

After the time limit fixed in the Declaration of Alajuela, of September 26, 2002 expired, Costa Rican authorities have resumed an intense campaign along with statements made by some officials, with the claim of carrying out armed navigation in Nicaragua's San Juan River.

V

Any claim from foreign forces to carry out armed navigation in Nicaraguan sovereign waters constitutes – in itself – a threat to the country's internal and external peace and safety and lessens the essential interests of its safety.

VI

The public claim to use sovereign Nicaraguan territory for armed navigation or in any other form related to such navigation, is not only inadmissible in the light of international law and treaties in force, but also constitutes a direct threat to the sovereignty and territorial integrity of the nation.

VII

The public claim to use the Nicaraguan sovereign waters of the San Juan River for the passing of armed personnel, relief, transportation of weapons, ammunition and any other foreign military or police activity, without an express authorisation, constitutes an intolerable challenge to the sovereign attributions of dominion and sovereign jurisdiction that Nicaragua has over its waters along its whole length.

VIII

Those claims are also a violation of community law and particularly, of the letter and spirit of the Framework Treaty on Democratic Security in Central America which establishes the obligation to help in the preservation of regional security and states that "…no country shall strengthen its own security at the expense of the security of other countries".

IX

The Declaration on Security in the Americas, of October 28, 2003, states that: " … unlawful trafficking of firearms, ammunitions, explosives, and other related materials, is a threat to hemispheric security, … exacerbates conflicts and poses a serious hazard to the safety of individuals. "

X

Article III (Sovereignty) Clause 2 of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials of November 13, 1997, reads: "A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved to the authorities of that other State Party by its domestic law."

XI

Member states are obligated to apply the Action Program of the United Nations to Prevent, Fight, and Eliminate Illicit Trafficking of Small Arms and Light Weapons in all of its aspects.

XII

Article 92, first paragraph, of the Political Constitution of Nicaragua establishes that the Nicaraguan Army is the armed Institution for the defence of the sovereignty, the independence, and the territorial integrity.

By virtue of the powers invested in him by the Political Constitution

HAS ISSUED

The following

DECREE:

Article 1. – The Government of the Republic of Nicaragua will not allow in any way armed navigation of foreign forces in national waters, as it is a flagrant violation of national sovereignty, the Political Constitution, and the law.

Article 2. - The Nicaraguan Army is ordered to immediately increase its presence and permanent surveillance at the San Juan River in order to prevent, with all the means provided to it by national legislation, the transit of armed personnel, the relief and the transportation of weapons, ammunition and supplies, by foreign forces, as well as any other activity related to the illicit trafficking of arms in all of its aspects.

Article 3. – The Ministry of the Interior, through the National Police Department, is ordered to proceed immediately to confiscate all the arms that are seized and take the offenders before the Nicaraguan Courts of Justice so they can be tried with the full severity of the law for the crimes they may have committed.

Article 4. –The people of Nicaragua are summoned to maintain a monolithic and unitary position around national authorities in charge of defending the sovereignty of the country.

Article 5. –This Decree will come into force upon its publication in any communication media which does not preclude its publication in the official newspaper, La Gaceta.

Given in the city of Managua, Presidential Office, on September 28, 2005. **ENRIQUE BOLAÑOS GEYER,** President of the Republic of Nicaragua. **DEYANIRA ARGUELLO ARANA,** Minister of the Interior by law. – **AVIL RAMIREZ VALDIVIA,** Minister of Defence.

EL GOBIERNO DE NICARAGUA NO PERMITIRÁ DE NINGUNA FORMA QUE FUERZAS EXTRANJERAS NAVEGEN ARMADAS EN AGUAS PERTENECIENTES AL TERRITORIO NACIONAL

DECRETO No. 65-2005, Aprobado el 28 de Septiembre del 2005

Publicado en la Gaceta No. 188 del 29 de Septiembre del 2005

El PRESIDENTE DE LA REPÚBLICA DE NICARAGUA

CONSIDERADO

I

Que la Constitución Política de la República de Nicaragua dispone en su artículo 1 que: "La independencia, la soberanía y la autodeterminación nacional, son derechos irrenunciables del pueblo y fundamentos de la nación nicaragüense. Toda injerencia extranjera en los asuntos internos de Nicaragua o cualquier intento de menoscabar esos derechos, atenta contra la vida del pueblo. Es deber de todos los nicaragüenses preservar y defender estos derechos";

II

Que de conformidad con el artículo VI del Tratado de Límites entre Nicaragua y Costa Rica, del 15 de abril de 1858: "La República de Nicaragua tendrá exclusivamente el dominio y sumo imperio sobre las aguas del río San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico...":

III

Que la Soberanía constituye la base fundamental sobre la cual reposa el orden jurídico internacional.

IV

Que habiendo concluido el plazo fijado en la Declaración de Alajuela del 26 de septiembre del año dos mil dos, autoridades de Costa Rica han reiniciado una intensa campaña acompañada de declaraciones de funcionarios con la ilegal pretensión de realizar acciones de navegación armada en el Río San Juan de Nicaragua.

V

Que cualquier pretensión de hacer efectiva la navegación armada por parte de fuerzas foráneas en aguas soberanas nicaragüenses constituye –en sí misma- una amenaza a la paz y la seguridad interior y externa del país y menoscaba los intereses esenciales de su seguridad.

VI

Que la pretensión pública de utilizar territorio soberano nicaragüense para la navegación armada o en cualquier forma relacionada con la misma, no solo es

inadmisible a la luz del derecho internacional y los tratados vigentes, sino que constituye una amenaza directa a la soberanía e integridad territorial de la nación.

VII

Que la pretensión pública de paso de efectivos armados, avituallamiento, traslado de armas, municiones y cualquier otra actividad de carácter militar o policial foráneas, sin la debida autorización expresa, en las aguas soberanas nicaragüenses del Río San Juan, constituye un desafío intolerable a los atributos soberanos de dominio y sumo imperio que posee Nicaragua sobre sus aguas en toda su extensión.

VIII

Que esas pretensiones constituyen también una violación al derecho comunitario y, especialmente, a la letra y el espíritu del Tratado Marco de Seguridad Democrática en Centroamérica que establece la obligación de contribuir a preservar la seguridad regional y estipula que" ...ningún Estado fortalecerá su propia seguridad menoscabando la seguridad de los demás"

IX

Que la Declaración sobre Seguridad en las Américas, del 28 de octubre de 2003, expresa que:" ...el tráfico ilícito de armas de fuego, municiones, explosivos y otros materiales relacionados, son una menaza a la seguridad hemisférica,... Exacerban los conflictos y representan un serio peligro para la seguridad de las personas.".

X

Que según la Convención Interamericana contra la Fabricación y el Tráfico Ilícito de Armas de Fuego, Municiones, Explosivos y otros materiales relacionados del 13 de noviembre de 1997, en su artículo III (Soberanía). Inciso 2 expresa: "Un Estado Parte no ejercerá en el territorio de otro Estado Parte jurisdicción ni funciones reservadas exclusivamente a las autoridades de ese otro Estado Parte por su derecho interno."

XI

Que los Estados Miembros están obligados a aplicar el Programa de Acción de las Naciones Unidas para Prevenir, Combatir y Eliminar el Tráfico Ilícito de Armas Pequeñas y Ligeras en todos sus aspectos.

XII

Que el artículo 92, párrafo primero, de la Constitución Política de la República de Nicaragua establece que el Ejército de Nicaragua es la Institución armada para la defensa de la soberanía, de la independencia y la integridad territorial.

En uso de las facultades que le confiere la Constitución Política,

HA DICTADO

El siguiente

DECRETO:

Artículo 1.- El Gobierno de la República de Nicaragua no permitirá de ninguna forma que fuerzas extranjeras naveguen armadas en aguas pertenecientes al territorio nacional, por constituir una violación flagrante a la soberanía nacional, la Constitución Política y las leyes.

Artículo 2.- Se ordena al Ejército de Nicaragua incrementar de inmediato la presencia y vigilancia permanente en el Río San Juan a fin de impedir por todos los medios que pone a su disposición la legislación nacional, el paso de efectivos armados, el avituallamiento y el traslado de armas, municiones y pertrechos por parte de fuerzas extranjeras, así como cualquier actividad vinculada al tráfico ilícito de armas en todos sus aspectos.

Artículo 3.- Se ordena al Ministerio de Gobernación, por medio de la Dirección General de la Policía Nacional, proceder al decomiso inmediato de las armas que se incauten y a poner a los responsables a la orden de los Tribunales de Justicia Nicaragüenses para su debido juzgamiento con todo el rigor de la ley por los delitos que se cometieren.

Artículo 4.- Se hace un llamado al pueblo de Nicaragua a mantener una monolítica y unitaria posición alrededor de las autoridades nacionales encargadas de la Defensa de la Soberanía del país.

Artículo 5.- El presente Decreto entrará en vigencia a partir de su publicación en cualquier medio de comunicación sin perjuicio de su publicación en La Gaceta, Diario Oficial.

Dado en la ciudad de Managua, Casa Presidencial, el veintiocho de septiembre del año dos mil cinco. **ENRIQUE BOLAÑOS GEYER**, Presidente de la República de Nicaragua. **DEYANIRA ARGUELLO ARANA**, Ministro de Gobernación por la Ley.- **AVIL RAMÍREZ VALDIVIA**, Ministro de Defensa.

Annex 70

NICARAGUAN PRESIDENTIAL DECREE NO. 97-2005
OF 2 DECEMBER 2005

SOURCE: *NICARAGUAN OFFICIAL GAZETTE NO. 237*
OF 7 DECEMBER 2005.
ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

AMENDMENT TO DECREE No. 57-2005

DECREE No. 97-2005, approved on December 02, 2005

Published in La Gaceta N° 237 of December 7, 2005

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

WHEREAS

I

On September 29, 2005, the Government of the Republic of Costa Rica filed a formal case before the International Court of Justice in The Hague, Holland, against the Government of the Republic of Nicaragua, in connection with navigation on the San Juan of Nicaragua River.

II

It is the duty of the State of the Republic of Nicaragua to guarantee the preservation and defence of the territorial sovereignty of the Republic of Nicaragua.

III

In order to face the international proceedings on the groundless claims of the Government of the Republic of Costa Rica, there should be a team of specialists on the international and technical aspects of this matter, whose hiring signifies a charge to the General Budget of the Republic.

IV

Pursuant to Law No. 290 "Organization, Competence, and Procedures of the Executive Power" and its corresponding Rules, it is the exclusive attribution of the Ministry of Foreign Affairs to conduct the defence of Nicaragua against Costa Rica's claims.

By virtue of the powers invested in him by the Political Constitution,

HAS ISSUED

The following:
DECREE
Amendment to Decree No. 57-2005

Article 1.- A paragraph is added at the end of article 3 of Decree No. 57-2005, published in La Gaceta, Official Newspaper No. 172 of September 5, 2005, which reads as follows:

"The proceeds from the consular visa paid by Costa Rican citizens will go to the General Budget of the Republic, and will be allotted to the Ministry of Foreign Affairs as income for a specific purpose, to pay for the expenses incurred in the defence before the International Court of Justice in The Hague, Holland for the case filed by the Government of the Republic of Costa Rica, in connection with navigation in the San Juan of Nicaragua River."

Article 2,- This Decree will come into force upon its publication in La Gaceta, Official Newspaper.

Given in the city of Managua, Presidential Office on December 2nd, 2005. **Enrique Bolaños Geyer,** President of the Republic of Nicaragua.

REFORMA AL DECRETO No. 57-2005

DECRETO No. 97-2005, Aprobado el 02 de Diciembre del 2005

Publicado en La Gaceta No. 237 del 07 de Diciembre del 2005

EL PRESIDENTE DE LA REPÚBLICA DE NICARAGUA,

CONSIDERANDO

I

Que el veintinueve de septiembre de dos mil cinco el Gobierno de la República de Costa Rica interpuso formal demanda ante la Corte Internacional de Justicia con sede en La Haya, Holanda, en contra del Gobierno de la República de Nicaragua, en relación a la navegación en el Río San Juan de Nicaragua.

II

Que es deber del Estado de la República de Nicaragua garantizar la preservación y defensa de la soberanía territorial de la República de Nicaragua.

III

Que para hacer frente al proceso de demanda internacional sobre las infundadas pretensiones que tiene el Gobierno de la República de Costa Rica, se debe contar con un equipo de especialistas en temas internacionales y técnicos en la materia, cuyas contrataciones representan erogaciones con cargo al Presupuesto General de la República.

IV

Que de conformidad con la Ley No. 290 "Ley de Organización, Competencia y Procedimientos del Poder Ejecutivo" y su correspondiente Reglamento, es atribución específica del Ministerio de Relaciones Exteriores, la conducción de la defensa de Nicaragua ante las pretensiones costarricenses.

En uso de las facultades que le confiere la Constitución Política,

HA DICTADO

El siguiente:

DECRETO

Reforma al Decreto No. 57-2005

Articulo 1.- Se adiciona un párrafo al final del arto. 3 del Decreto No. 57-2005, publicado en La Gaceta, Diario Oficial No. 172 del 5 de septiembre del 2005, el cual se leerá de la siguiente manera:

"Los ingresos obtenidos por concepto del pago de la visa consular que se emita a los nacionales de Costa Rica que ingresen al Presupuesto General de la República, serán destinados al Ministerio de Relaciones Exteriores como renta con destino especifico para cubrir los gastos de defensa ante la Corte Internacional de Justicia con sede en La Haya, Holanda, por la

demanda del Gobierno de la República de Costa Rica, en relac
navegación en el Río San Juan de Nicaragua."

Articulo 2.- El presente Decreto entrará en vigencia a partir de su
La Gaceta, Diario Oficial.

Dado en la ciudad de Managua, Casa Presidencial el día dos de di
dos mil cinco. **Enrique Bolaños Geyer**, Presidente de la República

Annex 71

"DEPARTURE CLEARANCE CERTIFICATE" CHARGED TO JORGE LAO, 25 OCTOBER 2007.

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

Republic of Nicaragua
NAVAL FORCE-ARMY OF NICARAGUA

Official cash receipt N° 13777

25 October 2007 For: 6.000 colones

Received from Mr. Jorge Lao

The amount of 6.000 colones (six thousand colones exact)

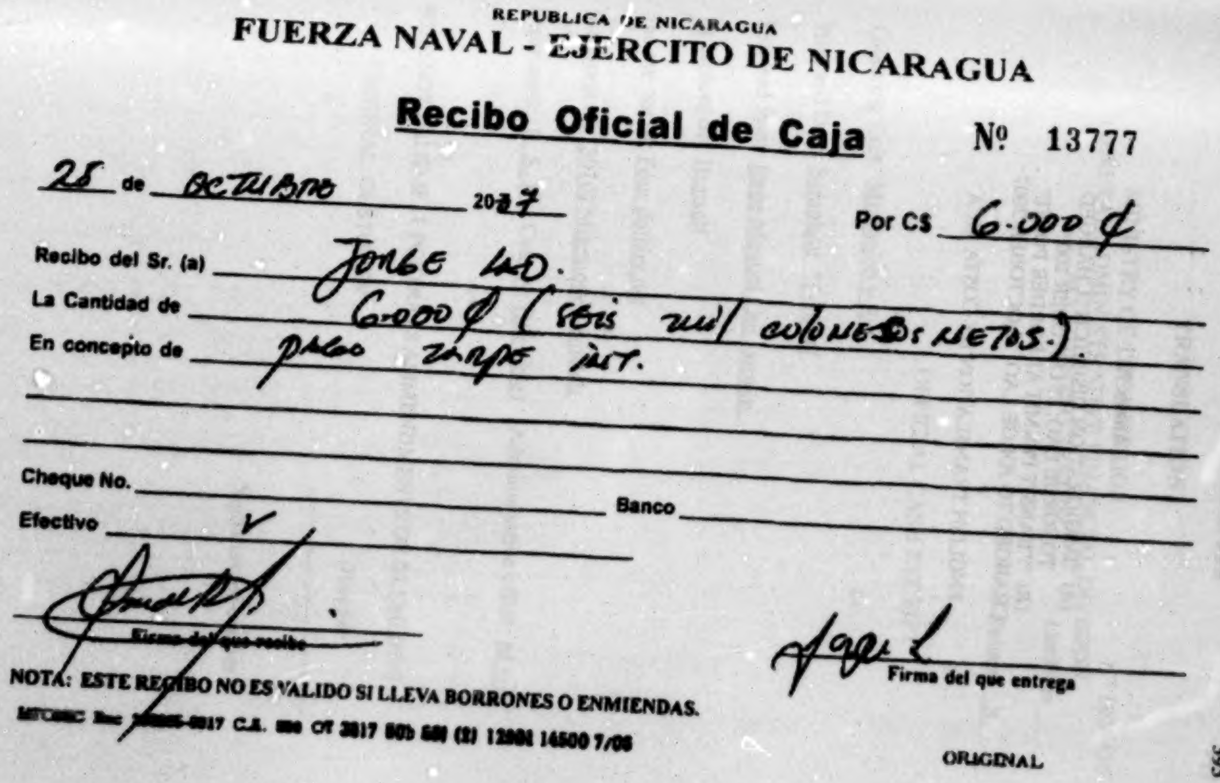
Corresponding to payment of international departure clearance

Check N° ________ Bank ____________________

Cash __V__

(signature illegible)	Jorge L
Signature of receiving party	Signature of paying party

NOTE: THIS RECEIPT IS NOT VALID IF IT PORTRAYS BLEMISHES OR AMMENDMENTS



REPUBLICA DE NICARAGUA
FUERZA NAVAL - EJERCITO DE NICARAGUA

Recibo Oficial de Caja Nº 13777

25 de Octubre 2007

Por C$ 6.000 ¢

Recibo del Sr. (a) Jorge Lao.

La Cantidad de 6.000 ¢ (seis mil colones netos.).

En concepto de pago zarpe int.

Cheque No. ______ Banco ______

Efectivo ✓

Firma del que recibe

Firma del que entrega

NOTA: ESTE RECIBO NO ES VALIDO SI LLEVA BORRONES O ENMIENDAS.

[illegible] Inc [illegible]-0017 C.A. [illegible] CT 2017 [illegible] (2) 12001 14500 7/06

ORIGINAL

Annex 72

(A) "IMMIGRATION DISPATCH" CHARGED TO JORGE LAO, 25 OCTOBER 2007
(B) "TRANSIT PERMIT AT BORDER POINT" CHARGED TO JORGE LAO, 25 OCTOBER 2007

ENGLISH TRANSLATION BY COSTA RICA

TRANSLATION

MINISTRY OF THE INTERIOR N° 1026635
GENERAL ADMINISTRATIVE FINANCIAL DIVISION
ACCOUNTING SYSTEM Cordobas ___

Dollars X

OFFICIAL CASH RECEIPT

Collecting Unit: Migracion y Ext 4=

Place and Date: Sarapiquí 25-10-97

Received from: Jorge Manuel Lao Jarquín

By account of: Himself

The amount of: Four dollars net

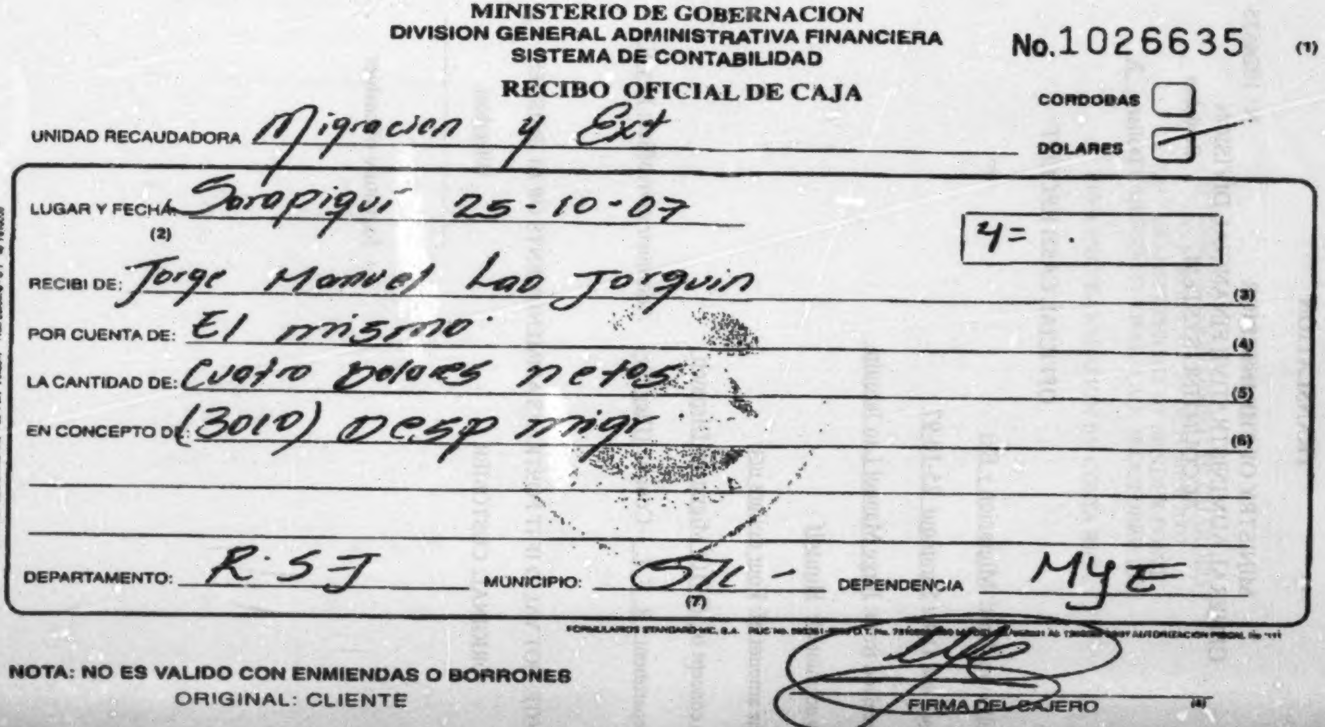
In concept of: (3010) Migratory Dispatch

Department: R. S. J. County: (Illegible) Administrative office: M y E

NOTE: NOT VALID IF IT PORTRAYS AMMENDMENTS OR BLEMISHES

ORIGINAL: CUSTOMER (Illegible)

Signature of cashier



MINISTERIO DE GOBERNACION
DIVISION GENERAL ADMINISTRATIVA FINANCIERA
SISTEMA DE CONTABILIDAD

RECIBO OFICIAL DE CAJA

No.1026635 (1)

CORDOBAS ☐
DOLARES ☑

UNIDAD RECAUDADORA Migracion y Ext

LUGAR Y FECHA (2) Sarapiqui 25-10-07

4= .

RECIBI DE: Jorge Manuel Lao Jorquin (3)

POR CUENTA DE: El mismo (4)

LA CANTIDAD DE: Cuatro Dolares netos (5)

EN CONCEPTO DE: (3010) Desp migr (6)

DEPARTAMENTO: R.S.J MUNICIPIO: SIL - (7) DEPENDENCIA MYE

FIRMA DEL CAJERO (8)

NOTA: NO ES VALIDO CON ENMIENDAS O BORRONES
ORIGINAL: CLIENTE

TRANSLATION

N° 1026682

MINISTRY OF THE INTERIOR
GENERAL ADMINISTRATIVE FINANCIAL DIVISION
ACCOUNTING SYSTEM

Cordobas ___

Dollars _X_

OFFICIAL CASH RECEIPT

Collecting Unit: Migracion y Ext 5=

Place and Date: Sarapiquí 25-10-97

Received from: Jorge Manuel Lao Jarquín

By account of: Himself

The amount of: Five dollars net

In concept of: (3170) Transit permit in border point

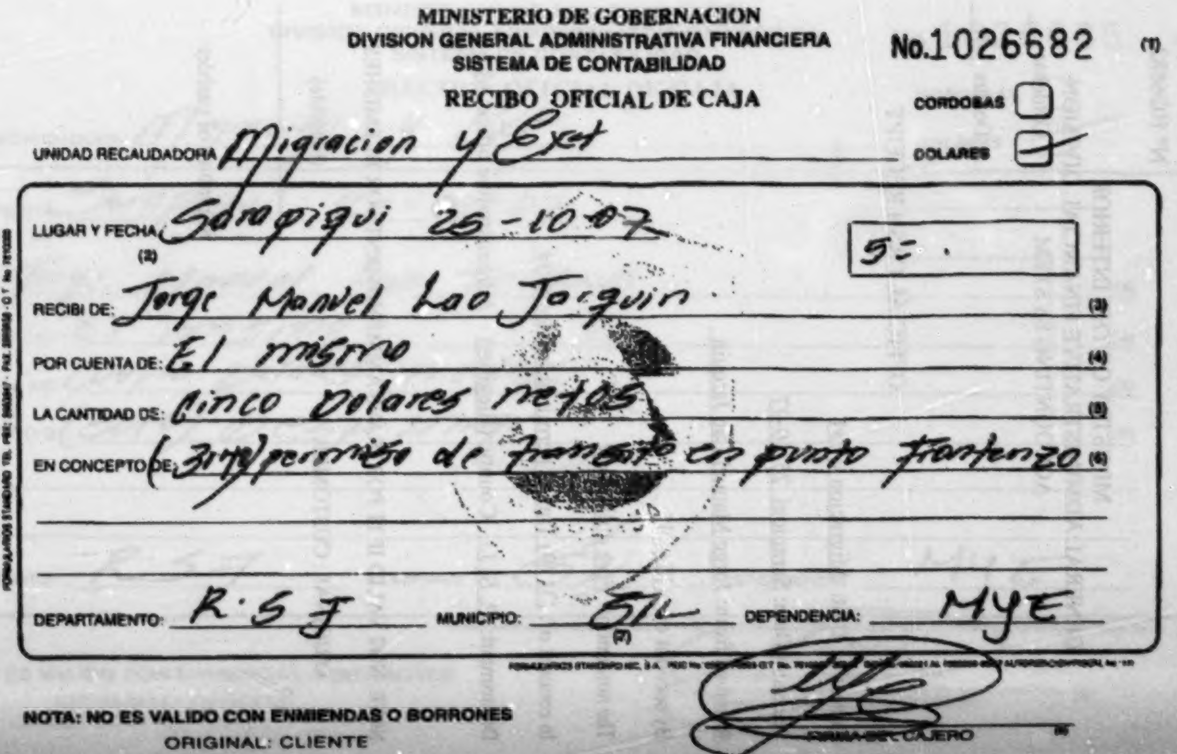
Department: R. S. J. County: (Illegible) Administrative office: M y E

NOTE: NOT VALID IF IT PORTRAYS AMMENDMENTS OR BLEMISHES

ORIGINAL: CUSTOMER

(Illegible)

Signature of cashier



MINISTERIO DE GOBERNACION
DIVISION GENERAL ADMINISTRATIVA FINANCIERA
SISTEMA DE CONTABILIDAD

No.1026682 (1)

RECIBO OFICIAL DE CAJA

CORDOBAS ☐
DOLARES ☑

UNIDAD RECAUDADORA Migracion y Ext

LUGAR Y FECHA (2) Sarapiqui 25-10-07

5=.

RECIBI DE: Jorge Manuel Lao Jorquin (3)

POR CUENTA DE: El mismo (4)

LA CANTIDAD DE: Cinco Dolares netos (5)

EN CONCEPTO DE: (3111) permiso de transito en punto fronterizo (6)

DEPARTAMENTO: R.S.J MUNICIPIO: SJL (7) DEPENDENCIA: MYE

FIRMA DEL CAJERO (8)

NOTA: NO ES VALIDO CON ENMIENDAS O BORRONES
ORIGINAL: CLIENTE

REJOINDER OF NICARAGUA

DUPLIQUE DU NICARAGUA

DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS

(COSTA RICA V. NICARAGUA)

REJOINDER OF THE REPUBLIC OF NICARAGUA

VOLUME I

15 JULY 2008

CHAPTER I:

INTRODUCTION

1.1. **Nicaragua submits this *Rejoinder* in response to Costa Rica's *Reply* of 15 January 2008, and in conformity with the Court's *Order* of 9 October 2007, which set the dates for the submission of the *Reply* and the *Rejoinder* as 15 January 2008 and 15 July 2008, respectively.**

1.2. **In this *Rejoinder*, Nicaragua will respond to the legal and factual arguments presented in the *Reply*, and to the evidence presented both in the *Reply* itself and in the Annexes thereto. In this Introduction, Nicaragua will first identify the legal and factual issues that now, at the conclusion of two rounds of written pleading, no longer appear to be in dispute. The written pleadings have narrowed the dispute in some significant respects, and these are pointed out in the first section of the Introduction.**

1.3. **The second section of the Introduction identifies the remaining disputed issues, and points out how they have been sharpened by the written pleadings. This section also provides an overview of the arguments and evidence that Nicaragua will add to the debate in Chapters II through VI of this *Rejoinder*.**

1.4. **The third and final section of the Introduction describes the structure of the *Rejoinder*.**

1.5. **Before proceeding further, however, Nicaragua wishes to comment on the tone of the *Reply*, which she hopes the Court will find not to have been replicated in this *Rejoinder*. In particular, Nicaragua wishes to express her dismay over the language in the *Reply*, which calls the *Counter-Memorial* "disingenuous" and** accuses Nicaragua of fabricating "distortions" of the law and the facts that are "not accidental". Nicaragua, of course, rejects these accusations, and stands behind her *Counter-Memorial* in all respects. To be sure, Nicaragua regards it as entirely appropriate to criticize the arguments of the other party, and to point out, forcefully at times, the flaws in the other party's logic or the lack of factual support for its contentions. Indeed, this *Rejoinder* does just that with respect to what Nicaragua regards as Costa Rica's fallacious arguments in the *Reply*. However, the *Rejoinder* nowhere accuses Costa Rica of deliberate or "not accidental" distortions, or of "disingenuousness", or similar forms of dishonesty or bad faith. Nicaragua believes that such accusations have no place in proceedings before the Court, and especially between two States that are good neighbours and sister republics of Central America with a long history of peaceful and positive relations.

Section I. Points of Agreement

1.6. With the submission of the *Memorial*, the *Counter-Memorial*, the *Reply*, and now this *Rejoinder*, the parties have either agreed upon, or at least not disputed the following legal and factual issues, which may now be taken as fully established by the Court:

- The rights claimed by Costa Rica in this case, if they exist, come from the 1858 Treaty of Limits between Costa Rica and Nicaragua and/or the 1888 Cleveland Award, which interpreted that Treaty, and from no other legal instruments. Thus, the Treaty of Limits and the Cleveland Award represent the governing law for this case.

- The Treaty of Limits was a boundary treaty that had as its principal object and purpose the settlement of the entire land border between Costa Rica and Nicaragua, and that, *inter alia*, included Nicaragua's concession that her former District of Nicoya would be part of Costa Rica. The annexation by Costa Rica of this district four years after independence had been hotly disputed by Nicaragua.

- The Treaty of Limits provided, and the Cleveland Award recognized, that the waters of the San Juan River belong to Nicaragua, who enjoys "exclusive dominion and supreme control (*sumo imperio*)" over the river.

- The Treaty of Limits provided, and the Cleveland Award confirmed, that Costa Rica would enjoy the "right of free navigation...*con objetos de comercio*" on the San Juan River.

- The Cleveland Award provided that Costa Rica would enjoy the right to navigate on the San Juan River with vessels of her revenue service when necessary to protect her right to navigate "for purposes of commerce"; President Cleveland rejected Costa Rica's submission that she had a right to navigate on the river with vessels of war.

- In securing for herself a "right of free navigation...*con objetos de comercio*" on the San Juan River, Costa Rica achieved her longstanding objective of obtaining the right to use the river as an outlet to the Caribbean Sea and Atlantic Ocean for her export trade to the European market, principally her export of coffee.

- **Although the importance of the San Juan to Costa Rica's export trade declined soon after the Treaty of Limits was executed, due to the construction of a railroad linking her coffee-growing region to her Caribbean ports and other factors, Costa Rica continued to use the river for the next 150 years principally for the small-scale trade of goods between the interior of the country and the small hamlets that were established along her (right) bank of the river.**

- **There was no regular transport of tourists to the San Juan River until the early 1990s, when Costa Rican vessels began bringing tourists along what the *Reply* describes as the "tourism route" down the Sarapiquí River (in Costa Rica) to the San Juan, then east along the San Juan for approximately 24 km, then down the Colorado River (in Costa Rica). Although Nicaragua claimed (and claims) that Costa Rican vessels have no right to transport tourists on the San Juan (since they are not "*objetos de comercio*" in Nicaragua's view), she never sought to prohibit or restrict this practice. Instead, she adopted and implemented regulations that serve her sovereign interests of environmental protection, crime prevention, navigational safety and border security.**

- **These regulations require vessels of all nationalities (including Nicaraguan vessels) carrying tourists to the San Juan to register with the Nicaraguan authorities upon entering and exiting the river, to undergo an inspection and obtain a clearance certificate assuring seaworthiness and the absence of contraband, to process passengers who are not Nicaraguan nationals or local Costa Rican residents through Nicaraguan immigration, and to refrain from navigating on the river after nightfall.**

- Given the nature of Costa Rica's use of the river during the 150 years that the Treaty of Limits has been in effect, which has turned out not to involve a significant export or import trade, and the absence of any threat to commercial navigation on the river, Costa Rica has not had a need to deploy vessels of her revenue service on the river for the purpose of protecting her right to navigate "*con objetos de comercio*", and has not done so. Nicaragua has never prohibited or interfered with navigation on the river by any Costa Rican revenue service vessel.

- As shown in the *Reply* and the Annexes thereto, navigation on the San Juan by Costa Rican public (as distinguished from commercial) vessels has never been "*con objetos de comercio*", but for one of three public purposes: bringing supplies or replacement personnel to border posts on Costa Rica's bank of the river; engaging in joint law enforcement activities with Nicaragua; or delivering social services to local hamlets on the Costa Rican shore. Until the middle of 1998, Costa Rican authorities requested and obtained permission from their Nicaraguan counterparts prior to these voyages, and Nicaragua imposed conditions on the navigation which Costa Rica accepted and complied with, including the condition that the Costa Rican officials aboard these vessels travel unarmed.

- In May 1998, the newly-elected government of Costa Rica took office and changed Costa Rican policy regarding the San Juan River. Under the new policy, which the new President and Public Security Minister of Costa Rica said was aimed at stopping illegal immigration from Nicaragua, Costa Rican security forces (the

Guardia Civil) were directed to ignore the Nicaraguan requirements for navigating on the river, and to deploy their vessels on the river with armed personnel, without seeking permission from or notifying their Nicaraguan counterparts, for the purpose of intercepting and detaining Nicaraguan citizens navigating on the river who were suspected of preparing to enter Costa Rica illegally. After several such interceptions and detentions of Nicaraguans navigating on the river, on 14 July 1998 Nicaragua instructed Costa Rica to stop this practice. When Costa Rica refused, Nicaragua prohibited all further navigation on the river by Costa Rican security forces.

- Since then, Costa Rican security forces have not navigated on the San Juan River. They have brought supplies and replacement personnel to border posts along the San Juan by land. Delivery of social services to riparian communities has continued, however, subject to the same conditions that existed before July 1998: prior authorization by Nicaragua, registration of the vessel upon entering and exiting the river, and inspection of the vessel to assure seaworthiness and absence of contraband.

Section II. Remaining Points of Disagreement

1.7. While there are a number of disputed legal and factual issues, they all derive from two fundamental points of disagreement between the parties. The two disputes at the heart of this case are:

a) *First,* whether Costa Rica has a right to navigate on the San Juan River for purposes other than navigation with articles of trade; and whether Costa Rica's right of navigation is subject to no controls by Nicaragua; or whether Nicaragua has a right to impose reasonable regulations on navigation to serve her sovereign interests in environmental protection, crime prevention, navigational safety and border security; and whether the regulations in fact imposed by Nicaragua for these purposes are reasonable.

b) *Second*, whether Costa Rica has a right to navigate on the San Juan River with her public vessels for all purposes, including law enforcement activities and delivery of social services unrelated to trade or commerce; and, if so, whether Nicaragua has the right to regulate such navigation to protect her sovereign interests described above, and whether she has regulated reasonably in this case.

1.8. With regard to the former issue, Costa Rica claims a right under the Treaty of Limits and the Cleveland Award to transport tourists as well as commercial goods on the San Juan River. For Nicaragua, Costa Rica's navigation right under those controlling legal instruments is limited to navigation *con objetos de comercio*, which means "with articles of trade" not passengers. However, Nicaragua has not sought to stop Costa Rican vessels from transporting tourists along the San Juan; she has sought only to regulate the practice. Costa Rica claims that her right under the Treaty and the Award is "free" of all regulation by Nicaragua. Nicaragua argues that, as the State endowed with "exclusive dominion and supreme control (*sumo imperio*)" over the river, she necessarily has the right to regulate navigation, as long as she does so reasonably and in defence of her legitimate sovereign interests, and that in fact her regulation of this activity has been eminently reasonable.

1.9. Much of the debate thus far has centred on the meaning of the words "*con objetos de comercio*," and, specifically, whether they are properly translated into English as "with articles of trade" (Nicaragua's translation) or "for purposes of commerce" (Costa Rica's translation). For example, Costa Rica devotes 37 paragraphs of her *Reply* (consuming 13 pages) to her argument that the Spanish word "*objetos*" means "purposes" or "objectives," in addition to two lengthy tables of "contemporaneous usages" that occupy another 53 pages on the same general point. Presumably, Costa Rica's intention is to demonstrate that the "purposes" or objectives" of commerce include performance of services, such as tourism, as well as trade in goods, although, curiously, only three paragraphs (and less than two pages) of the *Reply* address the issue of whether the quoted language gives Costa Rica a right to transport tourists on the San Juan.

1.10. Nicaragua's position, first articulated in the *Counter-Memorial* and supported by new evidence in this *Rejoinder* from the Spanish Royal Academy (*Academia Real*), is not only that the correct translation of "*objetos de comercio*" is "articles of trade," but that, even if Costa Rica's translation were correct, the phrase would mean the same thing, and limit Costa Rica to a right to use the river to trade in goods. That is because the most important word in the phrase is not "*objetos*" but "*comercio*," a word that the *Reply*, for all its focus on "*objetos*," virtually ignores. As will be shown below, the word "*comercio*," which is properly translated either as "trade" or "commerce," could only have meant "trade in goods" to the mid-nineteenth century drafters of the Treaty of Limits. At that time, the concept of trade or commerce referred to the purchase, sale, delivery, export or import of tangible goods. The idea that trade or commerce could include performance of services, as well as trade in goods, did not emerge until the following century. It is a twentieth, not a nineteenth, century construction of the term. Furthermore, all of the evidence shows that the parties clearly understood, both at the time they executed the Treaty of Limits and for the next 120 years or more, that the right that Costa Rica was accorded was a right to navigate with articles of trade, not a right to transport passengers, and that no one in 1858 or for the next 120 years envisioned that there would ultimately be an ecotourism industry that would transport tourists along the San Juan River. Indeed, this provision in the Treaty of Limits was the culmination of at least two decades of efforts by Costa Rica, which had continuously and urgently sought access to the San Juan as a trade route to the Atlantic, so that she could export her coffee and other products to Europe, not so that she could conduct sightseeing excursions to the area. Thus, even if "*objetos de comercio*" means "for purposes of commerce," an interpretation with which Nicaragua disagrees, the "commerce" in question can only refer to the trade of tangible goods.

1.11. Costa Rica is not unaware that "*comercio*" in 1858 could only have meant the trade of tangible goods. That is why the *Reply* goes to such lengths to argue for an "evolutionary" interpretation of the Treaty of Limits, and struggles to characterize it as something other than a boundary treaty and thereby avoid the obvious legal difficulties of applying such an interpretation to a Treaty of this nature. These efforts are to no avail. As shown in the *Counter-Memorial*, and as will be further shown within, the Treaty of Limits is not a misnomer. It is an accurate reflection of what the Treaty is. It is a Treaty of Limits, that is, a boundary treaty, whose principal object and purpose was the settlement of the entire boundary between Nicaragua and Costa Rica. Among its provisions is its endowment of Nicaragua with "exclusive dominion and supreme control (*sumo imperio*)" over the San Juan River. As discussed below, great care must be taken to avoid the "evolution" of a treaty in a manner that diminishes a State's sovereignty. Yet, that is exactly what Costa Rica seeks here.

1.12. While it should already be perfectly clear, Nicaragua wishes to leave no doubt that she fully understands and accepts that Costa Rica enjoys a right under the Treaty of Limits and the Cleveland Award to navigate on the river "*con objetos de comercio*," and that she may not stop Costa Rica from navigating on the river "*con objetos de comercio.*" But she has never attempted to do so. This case is not about Nicaragua preventing Costa Rica from navigating on the river with articles of trade. Costa Rica has presented no evidence of a disposition by Nicaragua to engage in such behaviour, let alone evidence of actual interference by Nicaragua with the exercise of this right.

1.13. To the contrary, this case is not about trade, but about Costa Rica's claim that her right of free navigation with "*objetos de comercio*" includes free navigation for all private commercial purposes including tourism. And even here, although Nicaragua stands by her interpretation of the Treaty of Limits that Costa Rica has no right to conduct tourism excursions along the San Juan, she has never sought to stop Costa Rica from engaging in this activity. Rather, Nicaragua's conduct has been limited to adopting and implementing reasonable regulations to ensure both that (i) the activity will continue, and (ii) that it will be conducted in a manner that does not harm Nicaragua's legitimate sovereign interests. As shown in the *Counter-Memorial*, and as will be further shown below, because she is the sovereign power over the river Nicaragua has a right to impose reasonable regulations on navigation, including navigation by Costa Rica; and the regulations imposed by Nicaragua are in fact reasonable. As indicated above, the parties are in agreement on what the regulations do: they require all tourism vessels (including those from Nicaragua) to register with Nicaraguan authorities on entering and exiting the San Juan, to undergo an inspection and obtain a clearance certificate as to seaworthiness and absence of contraband, to have foreign passengers processed by Nicaraguan immigration authorities, and to navigate only during daylight hours. In this *Rejoinder*, Nicaragua will show that all of these requirements are justified by Nicaragua's legitimate sovereign interests, including her interests in environmental protection, crime prevention, navigational safety and border security. She will also show that these requirements impose no more than minor inconveniences on tourism operators and their passengers. In fact, contrary to the unsupported assertions in the *Reply*, it will be demonstrated below that the recently initiated Costa Rican tourism on the San Juan actually *increased* after Nicaragua's regulations went into effect.

1.14. In considering the reasons supporting Nicaragua's regulations, particular attention is due to her need to protect the delicate ecosystem of the San Juan River and the surrounding area. The river forms part of one of the most ecologically diverse, valuable and fragile areas in the Western Hemisphere. In 1990, Nicaragua designated more than 435 km² of the southeastern portion of her territory, including the San Juan River, as the environmentally-protected Indio Maíz Grand Biological Reserve, home to more than 500 species of wildlife, many of them endangered, and many rare plant species. The area covered by this Reserve was later expanded to more than 3,150 km². In 2001, the San Juan River was designated as a wetland of international importance under the Ramsar Convention, obligating Nicaragua to afford greater protection to her dwindling and endangered species of fish, crustaceans and other aquatic life. To preserve the San Juan River Wildlife Refuge, which was carved out of the Indio Maíz Grand Biological Reserve, and to protect both of them against illegal poaching of animals, fish, trees and other plants, Nicaragua (unlike Costa Rica) prohibits human habitation on her side of the river. As a result, there are no settlements on the left bank of the river between the Bartola River (at the western end of the portion of the river where Costa Rica enjoys navigation rights) and the town of San Juan del Norte, where the river empties into the Caribbean Sea. Protection of the San Juan River Wildlife Refuge and the adjoining Biological Reserve against the illegal clearing and settlement of land, and the poaching of animals, fish and plant life, also requires constant vigilance by the Nicaraguan Army (which is responsible for the security of this remote region, there being no police presence) and officials of the Ministry of the Environment and Natural Resources. It requires, *inter alia*, registration and inspection of all vessels travelling on the San Juan to assure that neither the vessels themselves nor their passengers pose pollution, predation or other serious risks to the ecosystem. Given Costa Rica's international image as a staunch defender and protector of the environment, it is disappointing that she seems so unsympathetic to Nicaragua's efforts to prevent the same type of human destruction of natural beauty on the left bank of the river that Costa Rica has, unfortunately, allowed to take place on her own right bank[1].

1.15. With regard to the second fundamental dispute between the parties, it is Nicaragua's contention, based on the express language of the Treaty of Limits and the Cleveland Award, as well as the consistent practice of both parties subsequent thereto, that Costa Rica has no right to navigate on the San Juan River with her public vessels, save for the limited right to navigate with vessels of her revenue service, and even then only when there is a necessity to protect her right to navigate "*con objetos de comercio*". Costa Rica purports to find in these controlling legal instruments a general right of navigation for her public vessels. As Nicaragua has demonstrated in the *Counter-Memorial*, and as will be further shown below, no such right can be found in the text of the Treaty of Limits or the

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[1] Nicaragua is further dismayed by Costa Rica's recent announcement, in June 2008, that she has authorized the operation of an open pit gold mine at Las Crucitas near the border with Nicaragua, which is expected by Costa Rican and Nicaraguan environmental groups to pollute the San Juan River with cyanide and other toxic chemicals used in the mining process. *See* "Costa Rican Mine Has Unleashed Concern in Nicaragua," *Miami Herald* (Miami, FL), 21 June 2008. NR, Vol. II, Annex 27.

Cleveland Award. In fact, as explained below, Costa Rica's arguments in support of her alleged right to custody, protection and defence of the river with her public vessels is not only non-existent, but was specifically rejected by President Cleveland in 1888. There is nothing new about Costa Rica's arguments in the present case. They are the same ones she made unsuccessfully to President Cleveland 120 years ago. He rejected them and so should the Court. After a thorough review of the issue, all he conceded to Costa Rica was a right to navigate with her revenue vessels, and only then when it is necessary to do so in order to protect the right to navigate "for purposes of commerce." There is no other right to navigate with public vessels, let alone to navigate with public vessels for purposes unrelated to commerce.

1.16. This is confirmed by the consistent practice of the two parties between 1858 and 1998. Costa Rica presents some evidence in her *Reply* and Annexes on the use of the San Juan River by her public vessels during the century and a half following the execution of the Treaty of Limits. Nicaragua has carefully reviewed all of Costa Rica's evidence. As will be shown below, it actually supports Nicaragua's position, not Costa Rica's. Indeed, Costa Rica has produced no evidence that she has ever navigated on the river with vessels of her revenue service, or had a need to do so. Nor is there any evidence that Nicaragua ever interfered with her right to navigate in such manner. Instead, what the evidence produced by Costa Rica shows is that, during the past 150 years her public vessels have navigated on the river for only three purposes, none relating to her right to navigate "*con objetos de comercio*." In all cases, save for a brief period between May and July 1998, the Costa Rican vessels engaged in the navigation sought and obtained Nicaragua's express prior authorization to conduct the voyage, and agreed to and complied with the conditions imposed by Nicaragua on the navigation. Thus, the evidence of subsequent practice by the parties submitted by Costa Rica is entirely consistent with Nicaragua's position that Costa Rican public vessels enjoy no right of navigation on the San Juan River, and may only do so upon Nicaragua's authorization and subject to Nicaragua's conditions.

1.17. Costa Rica's evidence shows that by far the most frequent use of the river by her public vessels has been to bring supplies and relief personnel to the border posts she has maintained on the right bank of the river. She has presented one example of this practice in 1892, and then many other examples between 1994 and 1998, and more thereafter. The *Reply (*including the documents and witness statements annexed to it) – as well as the statements from Nicaragua's witnesses annexed to this *Rejoinder* – make clear that Costa Rican authorities regularly sought and obtained authorization from their Nicaraguan counterparts before embarking on these supply and relief missions, that they stopped to report at Nicaraguan Army posts upon entering and leaving the river, that they submitted to inspection of their vessels, and that their personnel were unarmed while travelling on the river (with arms stored on the floor of the vessel) and accompanied by Nicaraguan Army personnel. The evidence submitted by both parties shows that this was the consistent practice between 1994 and the middle of 1998 when, tellingly, Costa Rica asserts that Nicaragua first began to violate her rights in a systematic way. In other words, Costa Rica admits that the system in place between 1994 and the middle of 1998, as described in the documentary evidence and as summarized above, did not violate her rights.

1.18. Nicaragua disputes that she ever violated Costa Rica's rights, much less in a systematic way. However, Nicaragua agrees that a major change in relations between the parties, and in their practices on the river, took place in the middle of 1998. The evidence shows that after newly-elected President Miguel Angel Rodríguez took office in May 1998, he and his new Minister of Public Security, Juan Rafael Lizano, made an abrupt and aggressive change in Costa Rica's policy regarding navigation on the San Juan River. They publicly announced that they would no longer accept Nicaragua's conditions for navigating on the river with public vessels belonging to the *Guardia Civil* (which, although Costa Rica proclaims to the world that she has no army, constitutes nothing less than an army, with its more than 12,000 military personnel trained and armed by foreign powers, and its heavy weapons far in excess of anything possessed by Nicaragua). Instead, they announced, the *Guardia Civil* thenceforth would send its vessels onto the river with armed personnel, and without requesting authorization from Nicaragua, for the purpose of combating illegal immigration from Nicaragua. In implementation of this new policy, the *Guardia Civil*, by force of arms, began to intercept and detain Nicaraguans, who were navigating on the San Juan River (that is, in Nicaragua's sovereign territory) with an intention (as intuited by the *Guardia Civil*) to enter Costa Rica illegally. As reflected in the annexes to the *Reply*, the *Guardia Civil* carried out several of these missions in June and early July of 1998.

1.19. Nicaragua, through her Army, instructed the *Guardia Civil* to stop this practice immediately, explaining that it was a violation of Nicaragua's sovereignty for the *Guardia Civil* to navigate on the San Juan without Nicaraguan authorization, and an offence against Nicaragua's sovereignty for foreign military forces to detain and capture Nicaraguan citizens in Nicaraguan territory. When the *Guardia Civil* defied Nicaragua's instruction and claimed that the need to protect Costa Rica against illegal immigration justified her unilateral and unprecedented actions, Nicaragua, though her Army, prohibited all further navigation on the San Juan by vessels of the *Guardia Civil*. The documents and witness statements submitted by both parties, in the *Reply* and in this *Rejoinder*, concur that the Nicaraguan Army gave this order to the *Guardia Civil* on 14 July

1998, and that thereafter the *Guardia Civil's* interception and detention of Nicaraguans navigating on the river ceased, as did the *Guardia Civil's* practice of using the river to bring supplies and relief personnel to its posts along the river. According to the *Guardia Civil's* own records, annexed to the *Reply*, after 14 July 1998 the *Guardia Civil* regularly brought supplies and relief personnel to these posts by land instead of by boat.

1.20. Nicaragua maintains that her prohibition on the *Guardia Civil's* navigation on the San Juan after 14 July 1998 violated no right of Costa Rica. In the first place, Costa Rica enjoys no navigation rights for her public vessels, other than for vessels of her revenue service engaged in the protection of her right to navigate "*con objetos de comercio*". Beyond this, the practice of the parties prior to Costa Rica's sudden and dramatic policy change in May 1998 confirms that the *Guardia Civil* only navigated on the San Juan when authorized to do so by Nicaragua, and subject to conditions imposed by Nicaragua. Finally, the conditions imposed by Nicaragua, including the requirement that soldiers of a foreign military force transit Nicaraguan territory without bearing their arms, were reasonable exercises of Nicaragua's sovereign authority over the river, and warranted by Nicaragua's objective of protecting her own legitimate sovereign interests.

1.21. Costa Rica's evidence shows that the two other uses of the river made by her public vessels were also subject to the express prior authorization of Nicaragua. In the *Reply* and its Annexes, Costa Rica presents one instance of bilateral collaboration in law enforcement activities from 1892, and several examples of joint law enforcement exercises from the period 1994-1998. The documents submitted by Costa Rica show that the express authorization of Nicaragua's government was obtained before the 1892 incident, and that all of the other law enforcement activities were planned and carried out jointly with Nicaraguan Army personnel, obviously with Nicaragua's authorization. Significantly, the logs of *Guardia Civil* activities covering the period 1994-1998, which Costa Rica annexed to the *Reply*, identify not a single case of law enforcement activities conducted on the river by Costa Rican personnel prior to June 1998 other than those conducted jointly with Nicaragua. As indicated, in June and early July 1998, the *Guardia Civil* unilaterally and without authorization sent its vessels on the river to intercept and detain Nicaraguans thought to be potential illegal immigrants, but Nicaragua immediately protested these actions and, because of them, prohibited further use of the river by the *Guardia Civil*. As a consequence of this prohibition, no further law enforcement activities by Costa Rica have been carried out on the river, either unilaterally or jointly with Nicaragua. Nicaragua's refusal to authorize further joint law enforcement exercises does not violate any rights of Costa Rica.

1.22. The *Reply* shows that the only other use of the river made by Costa Rican public vessels has been for the delivery of certain public services – including medical, educational and social welfare services – by Costa Rican public officials to the small hamlets on Costa Rica's side of the river. Although Nicaragua maintains that Costa Rica has no right to use the river with her public vessels for these purposes, she has not objected to the practice. Nicaragua merely requires that Costa Rican vessels engaged in this form of navigation obtain prior authorization, register at Nicaraguan posts upon entering and leaving the river, and undergo an inspection for seaworthiness and presence of contraband. In the case of vessels transporting Costa Rican officials engaged in the delivery of social services, no fees are charged for the inspection and clearance certificate, or for any other purpose. Costa Rica's own witness statements by government officials who navigated on the river for these purposes, annexed to the *Reply*, confirm that

Nicaragua has regularly permitted the navigation to take place subject to these very conditions. While Costa Rica has presented evidence that some of her officials had difficulties in 2006 obtaining visas to enter Nicaragua, it appears from the *Reply* itself that the visas were almost always issued, and that the problems were resolved by 2007, when Nicaraguan visas began to be issued more expeditiously to Costa Ricans.

1.23. Here again, Costa Rica has failed to make out a case that Nicaragua has violated her rights under the Treaty of Limits or the Cleveland Award. Neither provides a right for Costa Rican public vessels to navigate on the river in order to deliver social services. Moreover, Nicaragua does not prevent this practice; she merely regulates it, and her regulations are both reasonable and inherent to her "exclusive dominion and supreme control (*sumo imperio*)" over the river.

Section III. Structure of the Rejoinder

1.24. Following this Introduction, Chapter II describes the Applicable Law in response to Chapter II of the *Reply*.

1.25. Chapter III addresses The Nature and Extent of Costa Rica's Right To Navigate "*con Objetos de Comercio,*" and responds to Chapter III, Sections B and C of the *Reply*.

1.26. Chapter IV describes the Reasonableness of Nicaragua's Regulation of Navigation on the San Juan River, and responds to Chapter III, Section E, and Chapter Four, Sections B and E of the *Reply*.

1.27. **Chapter V addresses Costa Rica's Alleged Rights of Protection, Custody and Defence of the San Juan River, and responds to Chapter III, Sections D and F, and Chapter Four, Sections C, D and F, of the *Reply*.**

1.28. **Chapter VI discusses the Remedies requested by the parties, and responds to Chapter V of the *Reply*.**

1.29. **Following Chapter VI Nicaragua concludes Volume I of this *Rejoinder* with her Submissions and a historical Appendix, which responds to the Appendix in the *Reply*. Volume II of the *Rejoinder* contains the Annexes.**

CHAPTER II:

THE APPLICABLE LAW

Section I. The Character of the 1858 Treaty as a Treaty of Boundaries

A. INTRODUCTION

2.1. The general character of the Treaty of 1858 remains a central element of the dispute before the Court. In her *Memorial* Costa Rica provides an Appendix in which it is asserted that the San Juan River "is governed by an international regime"[2]. This proposition is then elaborated on the basis that the San Juan is an "international river"[3]. This concept is based upon two considerations: first, that the San Juan is "a waterway regulated by international instruments"; and, secondly, that "the San Juan is a navigational waterway whose banks belong to two different States."

2.2. In the same section of the Appendix the *Memorial* concludes:

> "To sum up, the San Juan possesses an international status, since its banks belong to two different States, it provides access to the sea to both of them and its regime is regulated by international law, particularly treaty law."[4]

2.3. In principle, the position of Costa Rica as presented in the *Reply* remains the same, as in these passages:

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[2] CRM, para. A2.

[3] *Ibid.*, para. A7.

[4] *Ibid.*, para. A3.

> "2.35. According to Costa Rica, three elements are traditionally associated with the existence of international watercourses: (i) the presence of different riparians; (ii) the fact that the watercourse, if navigable, offers access to and from the sea to more than one State; and (iii) the existence of a treaty regime.
>
> 2.36. To qualify as an international watercourse, a river does not invariably have to fulfil all three conditions. But the San Juan fulfils them all. It is therefore, unquestionably, an *international* as well as a boundary river."[5]

2.4. However, there are elements of confusion and contradiction. In particular, there is a new emphasis upon the role of the San Juan as a boundary river (see *Reply* paragraph 2.36, quoted above) and the allegation that this involves a "disadvantaged position"[6].

2.5. The text of the *Reply* makes a very limited and fragmented effort to contradict the argument of Nicaragua in her *Counter-Memorial* relating to the character, object and purpose of the 1858 Treaty[7]. The purpose of this section of Chapter II is to counter the distortions in the *Reply* and to reinforce the central place of the evidence of the object and purpose of the Treaty of Limits.

2.6. It is clear that the applicable law takes the form of the provisions of the 1858 Treaty, the Cleveland Award and the principles of general international law[8]. The Cleveland Award is discussed in Section III, and the role of general international law is revisited in Section II of the present chapter.

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[5] CRR, para. 2.36.

[6] *Ibid.*, para. 2.33.

[7] *See* NCM, paras. 2.1.1-2.1.66

B. THE LEGAL AND HISTORICAL CONTEXT OF THE 1858 TREATY

2.7. It is the general position of the Applicant State that the case is related exclusively to navigation rights by virtue of Article VI of the 1858 Treaty. This position is intended to avoid a number of substantial flaws in the claim of Costa Rica. And a major difficulty faced by the Applicant is the true character of the legal and historical context.

2.8. The primary object and purpose of the 1858 Treaty was to settle a long-standing dispute concerning title to territory. In her pleadings Costa Rica appears to deny the reality of this, but fails to controvert the factual record. In her *Counter-Memorial* Nicaragua has set forth the negotiating history as recorded in the Rives Report dated 2 March 1888[9]. Costa Rica makes no effective challenge to this record. What she says is this:

> "Nicaragua's attempt to present itself as the loser in the bargaining leading to the Treaty of Limits of 1858 has no historical basis. Its presentation of the *quid pro quo* leading to the 1858 Treaty unjustifiably minimizes the importance of Costa Rica's perpetual right of free navigation, as explained in the Appendix to this *Reply*. *Despite the fact that Nicaragua attached importance to Rives' Report, it ignores the fact that Rives himself declared in that Report*:
>
> 'that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841 – which asserts as the

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[8] *See* NCM, para. 3.3.1.

[9] *See* NCM, para. 2.1.22.

> **boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan."[10]**

2.9. But in her *Counter-Memorial* Nicaragua does not ignore this part of the Rives Report, and the relevant passage is now quoted in full as follows:

> **"But with the establishment of the Federal Republic, and still more, with the dissolution, the questions of boundary began to assume importance.**
>
> **The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.**
>
> ***In 1838 Costa Rica seems to have urged upon Nicaragua – then assuming the rank of an independent State upon her withdrawal from the Federation – a desire for a recognition of the annexation of Nicoya. In 1846, 1848 and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.***
>
> **That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841 – which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan.[11]"**

2.10. This passage, as originally quoted in the *Counter-Memorial* with the key paragraph emphasised, provides a very clear indication of the historical context.

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[10] CRR, para. 2.67 (emphasis added).

[11] NCM, para. 2.1.24 (emphasis added).

The primary element in the context was the initiatives taken by Costa Rica relating to the recognition of the annexation of Nicoya.

2.11. In addition, Nicaragua refers to several bilateral treaties concerning dispute settlement which prefigure the 1858 Treaty and which, though not ratified, form part of the historical context, as Costa Rica accepts in her *Reply*[12]. The first of these treaties was the Marcoleta-Molina Treaty of 1854[13]. In her *Reply* Costa Rica asserts that Nicaragua states that the 1854 Treaty "clearly recognises that the River San Juan is entirely within Nicaragua"[14] and disputes whether this refers to a pre-existing sovereignty over the river. This observation in fact appears in paragraph 2.1.27 of the *Counter-Memorial* and refers to the Juarez-Cañas Treaty of 1857.

2.12. Whether or not the Marcoleta-Molina Treaty refers to a pre-existing sovereignty over the river, the text of Articles 1 and 2, quoted in the *Counter-Memorial*, makes a series of references to differences "regarding sovereignty of certain territories" (Article 1) and issues "with respect to borders, inland navigation, and sovereignty of whichever disputed territories, rivers, and lakes ..." (Article 2)[15].

2.13. The second treaty invoked by Nicaragua in her *Counter-Memorial* is the Juarez-Cañas Treaty of 1857[16]. The *Reply* makes no attempt to justify the allegation of Costa Rica that Nicaragua's presentation of this treaty is "misleading". In her *Counter-Memorial* Nicaragua observes that the Cañas-Juárez Treaty "would have constituted a definitive boundary, had it been ratified"[17]. What is certain is the fact that the first article of the treaty spells out, with great clarity, the predominance of the District of Nicoya, otherwise described as Guanacaste, in the agenda of disputes between Costa Rica and Nicaragua. The first Article is as follows:

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[12] *See* CRR, para. 2.68.

[13] *See* Marcoleta-Molina Preliminary Treaty, 28 January 1854. NCM, Vol. II, Annex 4.

[14] CRR, para. 2.68.

[15] NCM, para. 2.1.25.

[16] *See* Treaty of Limits (Cañas-Juárez), 6 July 1857 (unratified) (hereinafter "Cañas-Juárez Unratified Treaty"). CRM, Vol. II, Annex 5; quoted in NCM, para. 2.1.26.

> "First: The Government of Nicaragua, as a sign of gratitude for the Government of Costa Rica, for its good offices on behalf of the Republic, for the solid determination and great sacrifices made for the cause of national independence, waives, takes and puts away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the sovereign jurisdiction of said Government."[18]

2.14. These treaty texts refer to differences concerning title to territory, and the central feature of these differences was the unresolved issue created by the annexation of the large District of Nicoya by Costa Rica in 1824. The question of Nicoya has been carefully analysed in the *Counter-Memorial*[19]: The *Memorial* of Costa Rica presents an account of the historical facts which is based upon a series of omissions and distortions which have been chronicled in the *Counter-Memorial*[20].

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[17] NCM, para. 2.1.27.

[18] Cañas-Jerez Unratified Treaty, para, 1. CRM, Vol. II, Annex 5.

[19] *See* NCM, paras. 1.2.2-1.2.4 and 1.2.13-1.2.23.

[20] *See* NCM, paras. 1.2.48-1.2.49.

2.15. In response to the detailed historical facts set forth in the *Counter-Memorial*, Costa Rica has nothing of substance to advance. What appears in the *Reply* is the following paragraph:

> "Nicaragua presents the several diplomatic attempts to settle the disputes between the two countries after 1821 as being *travaux préparatoires* of the Treaty of Limits of 1858. Some of these attempts ended up in the signature of treaties, although they were not ratified and consequently never entered into force … In any event, contrary to what Nicaragua now claims, the previous unratified treaties and other diplomatic exchanges do not support an interpretation of the phrase '*con objetos de comercio*' as meaning exclusively transport of goods or as excluding transport of passengers, as will be shown below."[21]

2.16. These perfunctory and arid observations do not meet the Nicaraguan argument relating to Nicoya. Moreover, whether or not the diplomatic materials presented by Nicaragua are, formally speaking, *travaux préparatoires* of the Treaty of Limits of 1858, they constitute cogent evidence of the issues the resolution of which was the object and purpose of the Treaty of Limits.

2.17. While the primary object and purpose of the Treaty of 1858 was to settle a long-standing dispute concerning title to territory, there was a connected object which involved giving Costa Rica the right to navigate the San Juan River "*con objetos de comercio*" and thus to provide Costa Rica with an Atlantic (Caribbean) outlet for her trade with, and especially coffee exports to, Europe. This aspect of the Treaty, and the proper interpretation of the limiting phrase "*con objetos de comercio*" will be examined in detail in Chapter III.

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[21] CRR, para. 2.53 (footnote omitted).

C. ADMISSIONS BY COSTA RICA

2.18. At this stage in the argument it is opportune to point out the helpful admissions to be found in the *Reply* of Costa Rica. In the first place there is an admission of the centrality in the Treaty of Limits of the dispute relating to sovereignty over the frontier areas. The relevant passage is as follows:

> "The present case is not one in which one or more riparian States decide to set up a particular fluvial regime, granting rights to other riparians or even to non-riparians. On the contrary, *this case concerns a treaty which settled a dispute with regard to sovereignty over the frontier areas of both countries, including over the Son Juan River, recognising the sovereignty over the waters and one bank to one of the riparian States*, and granting a perpetual right of free navigation for purposes of commerce to the other. One attribution (Nicaraguan sovereignty) is inseparable from the other (Costa Rican navigation): the condition for the acceptance of the first was the acceptance by the other party of the second."[22]

2.19. The text which is highlighted in the quotation is broadly accurate, but the final sentence involves a false opposition. It was in fact Nicaragua which was to suffer a large scale excision of territory, and the sovereignty of Nicaragua acknowledged in respect of the river as such constituted a modest recompense for the loss of the District of Nicoya (Guanacaste)[23].

2.20. The next subject of admissions on the part of Costa Rica is the pertinence of the evidence of the object and purpose of the Treaty of Limits. The first passage on this topic reads as follows:

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[22] CRR, para. 2.69 (emphasis added).

[23] Title to the Nicoya (Guanacaste) District increased the territory of Costa Rica by more than 25% of her original territory at the time of Independence in 1821.

> "Formally, Nicaragua acknowledges that the provisions of Article 31 of the Vienna Convention of the Law of Treaties reflect customary international law and must be applied in the present case. However, some paragraphs later, Nicaragua tries to focus on the need to 'discover the thoughts of the author' in order to interpret purported "obscure passages" of treaties. Clearly, Nicaragua is inviting the Court to depart from the main means of interpretation depicted in the first paragraph of that Article: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to *the terms of the treaty in their context and in the light of its object and purpose.*'"[24]

In this passage the Applicant State recognises the legal significance of the context, together with the object and purpose, of the Treaty of Limits.

2.21. There is also a second passage in the *Reply* with the same emphasis:

> "Secondly, the interpretation must correspond to the ordinary meaning to be given to the terms of the treaty *in their context and in the light of the treaty's object and purpose*. As this Court stated even before the adoption of the 1969 Vienna Convention, 'the words are to be interpreted according to their natural and ordinary meaning in the context in which they occur' (*Case Concerning the Temple of Preah Vihear, ICJ Reports 1961*, p.32)."[25]

D. THE APPLICABLE PRINCIPLES OF INTERPRETATION

2.22. In the light of these passages from the *Reply*, Costa Rica appears to accept that the primary task is the interpretation of a bilateral treaty and that the applicable principles of interpretation of the Court are those contained in Article 31 of the Vienna Convention on the Law of Treaties. Within this broad context,

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[24] CRR, para. 2.48 (emphasis added, footnotes omitted).

[25] CRR, para. 2.51 (emphasis added).

Costa Rica contends that Nicaragua relies upon "a restrictive interpretation of the right of free navigation"[26]. The only reference used in the *Reply*[27] to support this assertion is to paragraph 2.1.51 of the *Counter-Memorial*, which reads in material part as follows:

> "There is a further important consideration arising from the fact that Article VI does not provide for 'free navigation' *tout court*, but only 'for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiqui, or any other way, proceeding from the bank of the San Juan River.' Thus the right of free navigation is articulated in the form of a careful statement of purposes. Indeed, the content of the Cleveland Award of 1888, in its second finding, underlines the special purpose of the right of navigation recognised in Article VI."[28]

2.23. The passage just quoted does not use the epithet "restrictive" and does not refer to a "principle of restrictive interpretation". In any case, the pleading of Costa Rica accepts that "the issue is one of context"[29], and this is surely the correct view of the law.

2.24. The *Reply* refers in this context to the case-law cited by Nicaragua[30]: In fact the only case discussed in the *Reply* is *The Wimbledon*. In the *Counter-Memorial*, the argument presented was based on the provisions of the Treaty of 1858 establishing Nicaraguan territorial sovereignty over the San Juan River, with the exception of certain limited rights of navigation[31]. A comparison was then drawn with the similar legal scenario in the *Wimbledon* case[32]. In that case the Permanent Court had no hesitation in recognising that the limitation placed upon Germany in respect of her sovereign rights over the Kiel Canal entailed a restrictive interpretation of the clause which produced the limitation. This, of course, is not an example of the application of an intrusive principle of restrictive interpretation, but a reference to the outcome of the specific treaty arrangements.

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[26] CRR, paras. 2.57-2.66.

[27] *See* CRR, para. 2.59, fn 154: "*See*, for example, NCM, para. 2.1.51."

[28] NCM, para. 2.1.51.

[29] CRR, para. 2.66.

[30] *See* CRR, para. 2.59.

[31] *See* NCM, para. 3.3.7.

E. THE APPLICATION OF THE GENERAL RULE OF INTERPRETATION TO THE TREATY OF LIMITS

2.25. The generally accepted principles are set forth in the Vienna Convention, and the dominant feature of these is the "general rule of interpretation" in Article 31. In essential part, Article 31 provides:

> "General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to *the terms of the treaty in their context and in the light of its object and purpose.*
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." (emphasis added)

2.26. In addition, Article 32 provides:

> "Supplementary means of interpretation

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[32] *See ibid.*, para. 3.3.8.

> **Recourse may be had to supplementary means of interpretation, *including the preparatory work of the treaty and the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:**
>
> **(a) leaves the meaning ambiguous or obscure; or**
>
> **(b) leads to a result which is manifestly absurd or unreasonable."(emphasis added)**

2.27. These provisions give prominence to the context and to the object and purpose of a treaty. At the same time, the starting point is always "the terms of the treaty". In the pages which follow, the terms of the 1858 Treaty will be analysed with particular reference to the context and to the particular object and purpose of settling a major and long-standing dispute about land boundaries.

2.28. The attitude of Costa Rica to the question of discovering the object and purpose of the 1858 Treaty is one of ambivalence. On the one hand, the text of the *Reply* recognises the principle involved, as in the following passages:

> **"2.50 The first principle of interpretation is that of good faith**
>
> **(...)**
>
> **2.51 Secondly, the interpretation must correspond to the ordinary meaning to be given to the terms of a treaty in their context and in the light of the treaty's object and purpose ..."[33]**

2.29. However, the Applicant State is remarkably reluctant in giving effect to the criteria clearly expressed in Article 31 of the Vienna Convention. In any event, the Court has found it helpful to rely on the criterion of applying the provisions of a treaty in order to give appropriate effect to its object and purpose,

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[33] **CRR, paras. 2.50-2.51.**

and has done so in eleven Judgments since 1986[34]. Two of these decisions involved the delimitation of boundaries. In the *Reply* Costa Rica seeks to draw assistance from the *Judgment* in the *Kasikili/Sedudu Island* case[35]. In her view, in that case navigation is treated as an important element of delimitation when the delimitation concerns international waterways[36].

2.30. This argument is misconceived. The historical background was, of course, markedly different in the *Kasikili/Sedudu Island* case. The background motivation was not the nature of rights of navigation within a river ascribed to one riparian, but the question of access to navigable rivers, and especially to the Zambezi. To enable equality of access to the Chobe, as a navigable river, and to the Zambezi, the delimitation was to be the centre of the main channel. The present case is very different. In any case navigation was not the sole objective of the relevant provisions, as seen from the text of the *Judgment*.

2.31. The true position is spelled out clearly in the relevant passages from the Judgment (with emphasis added to the passage quoted out of context in the *Reply*):

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[34] *See Military and Paramilitary Activities case (Nicaragua v United States), ICJ Reports 1986*, paras. 271-76; *Case Concerning Border and Transborder Armed Actions, ICJ Reports 1988*, para. 46; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1996*, para. 34; *Case Concerning Oil Platforms, ICJ Reports 1996*, paras. 23-28; *Case Concerning the Gabcikovo-Nagymaros Project, ICJ Reports 1997*, paras. 133-47; *Case Concerning Kasikili/Sedudu Island, ICJ Reports 1999*, paras. 43-45; *La Grand Case, ICJ Reports 2001*, paras. 101-102, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, ICJ Reports 2002*, paras. 49-52; *Case Concerning Avena and Other Mexican Nationals, ICJ Reports, 2004*, para. 85; *Case Concerning Legality of the Use of Force (Preliminary Objections), ICJ Reports, 2004*, paras. 100-114; *Case Concerning the Application of the Genocide Convention, 2007*, paras. 160-167.

[35] *See ICJ Reports 1999*, p.1045.

[36] *See* CRR, para. 2.71.

> "44. *The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence.* The great rivers of Africa traditionally offered the colonial powers a highway penetrating deep into the African continent. It was to gain access to the Zambezi that Germany sought 'a strip of territory which shall at no point be less than 20 English miles in width' – terms which were eventually included in the provisions of Article III, paragraph 2, of the Treaty. Admittedly, this strip of territory did provide access to the Zambezi, but its southern boundary was formed by the Chobe River, which was apparently assumed to be navigable, as suggested by the use of the word 'Thalweg' in the text of the German version of the Treaty. The difficulties of the land route owing to regular flooding, and the obstacles to navigation on the Chobe, were, in all probability, little known at the time.
>
> 45. The fact that the words 'centre of the main channel' were included in the draft Treaty on the initiative of the British Government suggests that Great Britain no less than Germany sought to have access to the Zambezi. In order to mark the separation of their spheres of influence the contracting parties chose 'the centre of the main channel' of the Chobe, thus ensuring that there was a well-defined, recognisable boundary, in a watercourse that was assumed to be navigable. There are grounds for thinking that one of the reasons underlying their decision was navigation, but the Court does not consider that navigation was the sole objective of the provisions of Article III, paragraph 2, of the Treaty. In referring to the main channel of the Chobe, the parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence."[37]

2.32. These passages provide no support for the Costa Rican thesis. The situation involved the *de novo* partition of large regions of a continent and did not relate to the settlement of pre-existing territorial disputes like that concerning the annexation of Nicoya. Furthermore, the use of the centre of the main channel as a division of areas of sovereignty (as well as access to navigable waters) is in complete contrast to the arrangements effected by the Treaty of Limits.

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[37] *ICJ Reports, 1999*, pp.1073-1074.

2.33. The decision in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*[38] is relevant in indicating the utility of the determination of the object and purpose of a boundary treaty in the process of interpretation. However, the decision has no more specific application for present purposes[39].

2.34. In addition to the jurisprudence of the Court, an extensive array of doctrine recognises the role of the object and purpose of a treaty as revealed in the text[40]. It is necessary to bear in mind that the reference to the object and purpose forms a part of the textual approach to the task of interpretation. The position is elucidated by Sir Ian Sinclair as follows:

> "Reverting to the general rule expressed in paragraph 1 of Article 31, we now have to consider the relevance of the object and purpose of the treaty, in the light of which it falls to be interpreted. We have already noted that the preamble to the treaty may assist in elucidating that object and purpose. It is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. *The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is in the light of the object and*

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[38] *See ICJ Reports, 2002*, p.625.

[39] *See ibid.*, p.652, para. 51, for the view of the Court on the delimitation.

[40] *See* the following sources: Mc Nair, *The Law of Treaties*, 1961, pp.380-381; Rousseau, *Droit International Public*, Vol. I, 1970, para. 241; *Oppenheim's International Law*, 9th ed. by Jennings and Watts, Vol. 1, *Peace*, 1992, pp. 1271-1274; Thirlway, *British Year Book* Vol. 62 (1991), pp. 37-44; and *ibid.*, Vol. 77 (2006), pp. 45-52; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., 1984, pp.113-135; Podesta Costa and Ruda, *Derecho Internacional Público*, Vol. II, 1985, pp. 103-105; Pastor Ridruejo, *Curso de Derecho Internacional Público*, 2nd ed., 1987, pp. 120-121.

> ***purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified."***[41]

2.35. The modalities of the provision which was to become Article 31 of the Vienna Convention were laid out very clearly in the Report of the International Law Commission to the General Assembly in 1966. There it is stated:

> "(12) *Paragraph* 1 contains three separate principles. The first – interpretation in good faith – flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. *The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.* These principles have repeatedly been affirmed by the Court. The present Court in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* said:
>
> > 'The Court considers it necessary to say that the first duty of a Tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.'
> >
> > And the Permanent Court in an early Advisory Opinion[42] stressed that the context is not merely the Article or section of the treaty in which the term occurs, but the treaty as a whole:
> >
> > In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to

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[41] *Op. Cit.*, p.130 (emphasis added).

[42] *See Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos. 2 and 3, p. 23.

> be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.'
>
> Again the Court has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision."[43]

1. *The Object and Purpose Indicated in the Text of the Treaty*

2.36. It is now appropriate to analyse the evidence of the object and purpose in the form of the title and text of the Treaty of 1858. This analysis remains necessary given that the *Reply* shows a strong aversion to the examination of the text of the Treaty as a whole.

(a) *The Title and the Preamble*

2.37. The title of the Treaty speaks for itself[44]. In the Spanish text it is *Tratado de Limites entre Nicaragua y Costa Rica* and, in English, the Treaty of Limits between Costa Rica and Nicaragua. In the text of the Cleveland Award it is referred to as the "Boundary Treaty of 1858 between Costa Rica and Nicaragua"[45].

2.38. The preamble forms a part of the context of a treaty, as specified in paragraph 2 of Article 31 of the Vienna Convention. The Court has made recourse to the statement of the object and purpose of the treaty in the preamble in the process of interpretation[46].

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[43] *Yearbook*, ILC, 1966, Vol. II, p. 221 (emphasis added, footnotes omitted).

[44] *See* CRM, Vol. II, Annex 7.

[45] Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), Nicaraguan English translation submitted to Cleveland. CRM, Vol. II, Annex 7(c), Appendix B, p. 55.

2.39. The preamble to the Treaty of Limits of 1858 provides a clear confirmation of the object and purpose of the agreement as follows:

> "We, Maximo Jerez, Minister Plenipotentiary of the Government of the Republic of Nicaragua, and Jose Maria Cãnas, Minister Plenipotentiary of the Government of the Republic of Costa Rica, having been commissioned by our constituents *to conclude a Treaty on the boundaries of the two Republics*, which may put an end to the differences that have retarded the better and more perfect understanding and harmony which ought to prevail between them for their common security and aggrandizement, having interchanged our respective powers, ... and having in the presence and with the assistance of the Representative of San Salvador, discussed the different points with the necessary care and precaution, have agreed on, and concluded *the following Treaty of boundaries* between Nicaragua and Costa Rica...[46]"

2.40. Thus the explicit purpose of the two Governments was "to conclude a Treaty on the boundaries of the two Republics."

(b) The Provisions of the Treaty

2.41. The provisions of the Treaty, both in their individual content and in their sequence, give priority and emphasis to the business of establishing a boundary line. Article 1 explicitly indicates the historical background in the reference to

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[46] *See* the *United States Nationals in Morocco* case, *ICJ Reports, 1952*, pp.183, 184, 196, 197, 198; *South West Africa* cases, *ibid.*, 1966, p.24, para 21 (emphasis added).

[46] Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), English translations. CRM, Vol. II, Annex 7(d), pp. 62-65 (emphasis added).

"differences about boundaries", and the need to proceed to the consolidation of "peace, happily re-established".

2.42. Articles II and III are devoted to the establishment of the boundary line as follows:

> "II. The boundary line between the two Republics, setting out from the Northern Ocean, shall commence at the extremity of Punta de Castilla, in the mouth of the River San Juan de Nicaragua, and shall continue, always following the right bank of the said river, up to a point distant from Castilla Viejo 3 English miles, measured from the outer fortifications of the said Castilla to the said point. From thence the line shall continue in a curve, the centre of which shall be the said fortifications, and from which it shall be distant 3 English miles throughout its course, until it arrives at a point two miles distant from the river bank above the Castillo. From thence it shall continue in a direction towards the River Sapoa, which falls into the Lake of Nicaragua, always two miles distant from the right of the San Juan River, with its circumvolutions, up to its origin at the Lake, and from the right banks of the lake itself, until it arrives at the above-mentioned River Sapoa, where this line, parallel to the said banks, shall end. From the point where this line meets the River Sapoa, and which must, according to the aforesaid, be two miles 'distant from the lake, a straight line shall be drawn to the centre of Salinas Bay on the Pacific, where the boundary-line between the two Contracting Republic ends.
>
> III. This boundary line shall be measured entirely or in part by Commissioners of the two Governments, at a time which shall be fixed by them. The said Commissioners shall be at liberty to deviate from the curve round the Castilla, for the parallel along the shores of the river and lake, and from the straight line between Sapoa and Salinas, if they should agree thereon, for the purpose of finding natural landmarks."[46]

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[46] Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), English translations. CRM, Vol. II, Annex 7(d).

2.43. Articles IV and V are concerned with the legal status of particular locations. Following these four articles involving a territorial division, Article VI forms part of the overall settlement of the differences which resulted in the war of 1857 and provides as follows:

> "VI. The Republic of Nicaragua shall have the exclusive dominion and supreme control over the waters of the River San Juan from their issue out of the lake to their discharge into the Atlantic Ocean. But the Republic of Costa Rica shall have the perpetual right of free navigation in these waters from the mouth of the river up to 3 English miles below Castillo Viejo, for commercial purposes ["*con objetos de comercio*"], whether with Nicaragua or with the interior of Costa Rica by the Rivers San Carlos or Sarapiqui, or any other route starting from any point on the bank of the San Juan River belonging to that Republic.
>
> The boats of either country may touch at any part of the banks of the river where the navigation is common, without paying any dues except such as may be established by agreement between the two Governments."[47]

2.44. The first element in this provision concerns "the exclusive dominion and supreme control (*exclusivamente el dominio y sumo imperio*)" over the waters of the River San Juan. This is the primary principle and the reference to navigation is logically a secondary element.

2.45. The provisions of Article VII emphasise the general purpose of the Treaty, as the creation of a "territorial division". Thus Article VII provides that:

> "It is agreed that the territorial division made by this Treaty, is in no wise to be understood as contrary to the obligations incurred either by political Treaties or contracts of canalization

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[47] *Ibid.*

> or transit entered into by Nicaragua before the recognition of the present Convention; it is understood rather that Costa Rica assumes those obligations, in the part which belongs to her territory, without any prejudice to her sovereign rights and dominion over the same."[48]

(c) The General Character of the Treaty of 1858 as Revealed in the Diplomatic Correspondence and Negotiations Subsequent to the Treaty of 1858

2.46. In the *Counter-Memorial* Nicaragua explains how the general character of the Treaty of 1858 as a treaty of peace and boundaries is reflected in the diplomatic correspondence subsequent to the conclusion of the Treaty[49].

2.47. While the Applicant State recognises the relevance of subsequent practice in principle[50], the materials invoked by Nicaragua on this subject are ignored.

2.48. In this context Costa Rica remains silent in face of the correspondence of the years preceding the agreement to the arbitration of President Cleveland in 1888. The relevant data of the *Counter-Memorial* which are ignored in the *Reply* are as follows:

> "2.1.38 By the year 1870 the Nicaraguan Government started to raise the question of the validity of the 1858 Treaty, and asserted that its provisions were incompatible with the Constitution of Nicaragua. The relevant correspondence includes the following items:

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[48] *Ibid.*

[49] *See* NCM, paras. 2.1.36-2.1.39.

[50] *See* CRR, paras. 2.55-56.

> i) Nicaragua to Costa Rica, 1 February 1871. In this Note Nicaragua complains of the loss of Guanacaste as a consequence of the Treaty of 1858.
>
> ii) Costa Rica to Nicaragua, 22 July 1872. This substantial document sets forth arguments relating to the boundaries of Nicoya (Guanacaste), and the claim of Costa Rica to title. And it is pointed out that the Treaty of 1858 confirmed that Nicoya was an integral part of Costa Rica.
>
> iii) Message of the State Department of Nicaragua to the Senate of Nicaragua on 8 January 1876, giving the history of the boundary question with Costa Rica and the invalidity of the 1858 Treaty."[51]

2.49. The correspondence on this theme persisted until the two States agreed to the arbitration of President Cleveland in 1888. Two letters from the year 1888 are fairly typical of the milieu. The immediate subject of discussion was the legality of the presence on the San Juan of a Costa Rican steamship.[52]

(d) *The Object and Purpose as Revealed in the Cleveland Award of 22 March 1888 and the Report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888*

2.50. The Rives Report provides a detailed account of the historical background of the Treaty of 1858, and an elaboration of the relevance of territorial claims. These materials are set forth in the *Counter-Memorial*[53] and will not be reiterated here.

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[51] NCM, para. 2.1.38.

[52] *See* Note of Nicaragua to Costa Rica, dated 3 August 1886, and the response of Costa Rica, dated 31 August 1886.

[53] *See* NCM, paras. 2.1.22-2.1.24.

F. THE ROLE OF INTER-TEMPORAL LAW IN THE PRESENT CASE

2.51. In her *Counter-Memorial* Nicaragua has invoked the principle of inter-temporal law in relation to the determination of the object and purpose of the Treaty of Limits at the time of its conclusion. In doing so Nicaragua has presented ample legal materials in support of the law as understood at the relevant period[54], including the Arbitral Award in the case of the *Reserved Fisheries* between the United States and Britain of 1858[55], and the works of Carlos Calvo and Andres Bello.

2.52. In the *Reply* the Applicant State does not reject the application of the principle of inter-temporal law as such but introduces certain elements of confusion[56].

1. First Element of Confusion

2.53. In the first place, Max Huber is quoted to support an alleged "second rule of the inter-temporal law" to the effect that the existence of a right "shall follow the conditions required by the evolution of law." The passage from the Award requires a fuller presentation than appears in the *Reply*. In its full version the passage in the *Island of Palmas* case reads as follows:

> "If the view most favourable to the American arguments is adopted – with every reservation as to the soundness of such view – that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking

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[54] *See* NCM, paras. 2.1.14-2.1.17.

[55] De la Pradelle and Politis, *Recueil des Arbitrages Internationaux*, II, p.440, at p. 447.

[56] *See* CRR, paras. 2.43-2.45.

possession, involved *ipso jure* territorial sovereignty and not merely an 'inchoate title', a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognised by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.

> **This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called inter-temporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared."[57]**

2.54. The question of law elaborated by Huber is to be seen in its context. There is no issue of a rule of inter-temporal law, and certainly not of a rule pertaining to the interpretation of bilateral treaties.

2. Second Element of Confusion

2.55. The second element of confusion is to use reference to the 'notion of inter-temporal law' as an excuse to introduce the issue of the relevance of general international law. The relevance of general international law is a qualitatively different issue, and will be examined in Section II below. In any event it is clear that there can be no presumption that a principle of general international law can intrude in order to modify the effects of the negotiated provisions of a bilateral treaty. The provisions of such an instrument would inevitably reflect the precise concerns of the parties at the material time. It would be wholly irregular to seek

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[57] ***Island of Palmas Case*, UNRIAA, II, pp.845-846.**

to use the notion of inter-temporal law to disturb the stable regime embodied in a treaty establishing boundaries and settling territorial claims.

3. *Third Element of Confusion*

2.56. The further element of confusion is the proposal that the subject of the Treaty of 1858 must involve "the evolution of general international law regarding the right of navigation of riparian states in international waterways"[58]. No evidence is offered to show that the provisions of the 1858 Treaty are subject to a process of evolution. The governing principle is the intention of the parties at the time of the conclusion of the treaty. As the Court stated in the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*:

> "53. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, *but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law*, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important

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[58] CRR, para. 2.45.

> developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.
>
> 54. In the light of the foregoing, the Court is unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B' mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under 'C' mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could 'be best administered under the laws of the Mandatory as integral portions of its territory'. (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with 'A' or 'B' mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:
>
> 'The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations.' (*I.C.J. Reports* 1962, p.329.)"[59]

2.57. This reasoning is directly related to developments concerning self-determination and human rights affecting "the entire legal system prevailing at the time of the interpretation". There is no comparison here with the principles relating to watercourses, and, even less, with a watercourse forming part of a Treaty of Limits closely anchored in specifics which are both regional and historical. In the present case the "entire legal system" consists essentially of the bilateral treaty, the character of its provisions, and especially the objective of achieving a stable territorial settlement.

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[59] *ICJ Reports, 1971*, pp.31-32, paras. 53-54 (emphasis added).

G. THE PRIMARY OBJECT AND PURPOSE OF THE 1858 TREATY AS A TREATY OF LIMITS: THE LEGAL CONSEQUENCES

1. *The Theses of Costa Rica Concerning Treaty Interpretation*

2.58. It is obvious that the San Juan River is subject to a regime designated by a bilateral treaty. No rights are created for third states and the provisions of the Treaty of Limits reflect its purpose in establishing boundaries as a basis for peaceful relations. The object and purpose of the Treaty in relation to the settlement of boundaries is unequivocally indicated by the preamble, by the provisions, and by the historical background.

2.59. Prior to an examination of "the principles of interpretation" in her *Reply*[60], Costa Rica seeks to use a typology of watercourses to create a set of suppositions intended to stand in front of, and to obscure, the process of treaty interpretation[61].

2.60. The first of these suppositions is that the San Juan is a "boundary river"[62]. By this is meant a river in which the boundary is drawn on the shoreline of one of the riparian States. As will be demonstrated below, there is no basis in general international law for giving this fact any consequences in favour of the position of Costa Rica on her navigation rights.

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[60] CRR, paras. 2.41-2.73.

[61] *See ibid.*, paras. 2.02-2.40.

[62] *Ibid.*, paras. 2.19-2.33.

2.61. The second supposition in the *Reply* is to the effect that the San Juan is an "international boundary river"[63]. In the analysis offered by Costa Rica, the advantage this supposition gives Costa Rica remains very obscure. The key paragraphs are as follows:

> **"2.37 The characterisation of the San Juan as an international boundary watercourse entails that the rules of general international law apply to it unless they are pre-empted by treaty rules or binding decisions (here the Cleveland Award and the Judgment of the Central American Court of Justice). It also entails the applicability of the general rules on territorial sovereignty pursuant to which the respondent State exercises sovereignty over the waters of the San Juan, always subject to its international obligations.'**
>
> **2.38 The Treaty and the pertinent arbitral and judicial rulings must be appreciated in the light of the rules of interpretation laid down by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969. The interpretation of the provisions of the 1858 Treaty must take account of the rules of general international law relating to watercourses and the circumstances surrounding that Treaty, including the fact that the boundary runs on the Costa Rican bank. The rules of interpretation in question do not in all aspects correspond to those invoked by Nicaragua in the present controversy."[64]**

2.62. As has been pointed out already, these passages exhibit considerable confusion concerning the applicable law. In particular, the relation of the treaty provisions and general international law is not clearly articulated.

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[63] ***Ibid.*, paras. 2.34-2.39.**

[64] **CRR, paras. 2.32-2.38.**

2.63. Invoking the typology of watercourses is unhelpful. The doctrine shows a reluctance to generalise from the European treaty practice. Thus Dr. Whiteman reports the opinion of Alvarez with approval:

> "At the Barcelona Conference, the Chilean publicist, Alejandro Alvarez, in his report as chairman of the subcommittee on navigable waterways, noted:
>
> > 'The principle of freedom of navigation on rivers has not evolved in the same manner in the American Continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but as a concession accorded voluntarily by the riparian States through the medium of inter partes agreements or of legislative acts ...'
> >
> > League of Nations, Barcelona Conference, Verbatim Records and Texts Relating to the Convention on the Regime of Navigable Waterways of International Concern (Geneva, 1921) 225-226."[65]

2. *The Response of Costa Rica to the Analysis Presented in the* Counter-Memorial

2.64. In the *Counter-Memorial*[66] Nicaragua presents an analysis of the legal consequences flowing from the object and purpose of the Treaty. The *Reply* contains no clearly integrated response to what is said in the *Counter-Memorial*, and it is therefore necessary to seek out the disassociated comments which have been introduced in Chapters II and III of the *Reply*. Nicaragua maintains that these comments, both individually and as a composite, do not constitute an effective response to the analysis contained in the *Counter-Memorial*.

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[65] Marjorie M. Whiteman, *Digest of International Law*, Vol.3, Department of State Public. 7737, released October 1964, p. 881; *see also* the work of Carlos Sosa Rodriguez, *Les Fleuves de l'Amérique Latine et le Droit des Gens*, Paris, 1935, pp. 65-66 and 89-119.

[66] *See* NCM, paras. 2.1.46-2.1.66.

2.65. The response of the Applicant State will now be analysed in relation to each relevant paragraph of the *Counter-Memorial*.

2.66. In her *Counter-Memorial* Nicaragua explains that the position of Costa Rica that her "vessels must be permitted to navigate the Rio San Juan '*sin ninguna condicion*' ("without any condition"), and that, in consequence, Nicaragua may not exercise any rights of sovereignty and jurisdiction"[67] is untenable[68]. The response of the Applicant State to this reasoning, insofar as it is visible, is exiguous and fissiparous. The relevant passages of the *Reply* are in paragraphs 2.57 and 2.58.

2.67. It is difficult to understand why the Applicant State considers these observations in her *Reply* to be helpful to her case. No admission has been made by Nicaragua in her *Counter-Memorial* to back Costa Rica's position. Moreover, generally speaking, these paragraphs from the *Reply* are consonant with the position of Nicaragua. Thus, a particular right of Costa Rica (free navigation) is presented in the Treaty of Limits as a qualification of the general grant of rights (in the form of title to territory) to Nicaragua. The Treaty provisions show that it is Nicaragua's sovereignty which is limited by the particular right of Costa Rica of free navigation. As the *Reply* helpfully acknowledges in paragraph 2.58: "the rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Treaty of Limits."

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[67] NCM, para. 2.1.47.

[68] *See* NCM, paras. 2.147- 2.1.50.

2.68. Nicaragua's *Counter-Memorial* recalls:

> **"2.1.51 There is a further important consideration arising from the fact that Article VI does not provide for 'free navigation' *tout court*, but only 'for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiqui, or any other way, proceeding from the bank of the San Juan River....'**
>
> **2.1.52 From this premise two conclusions follow. First, the fact that the right of navigation is subject to careful definition and precise limitation confirms the view that the right is to be exercised in a context of Nicaraguan sovereignty and general jurisdiction. Secondly, Nicaragua must have the power to regulate Costa Rican traffic for the purpose of ensuring that the conditions of the right of navigation laid down in the Treaty are being observed."[69]**

2.69. The response of Costa Rica in the *Reply* is two-fold. First, it is claimed that such a regulatory power "amounts to an effective denial of Costa Rica's right" (of navigation). But this is clearly not the case[70]. Secondly, it is claimed that such regulatory powers do not stem from any of the applicable instruments[71]. But it is impossible both in law and in practice to have a right of navigation which is not subject to regulation and policing. This form of practical necessity is recognised by the standard authorities cited in the *Counter-Memorial* at paragraphs 2.1.53 to 2.1.57, including the opinions of Wheaton and O'Connell. In other words, the right of navigation must be compatible with the nature of territorial sovereignty.

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[69] *Ibid.*, 2.1.51-2.1.52.

[70] CRR, pp.47-48, para. 3.14.

[71] *See ibid.*, para. 3.24.

2.70. In response to the proposition in the above indicated paragraphs of the *Counter-Memorial*, Costa Rica observes in her *Reply*,

> "3.25 Some of the writers cited by Nicaragua in support of its views on the purported right of regulation only address the issue of regulatory rights in relation to innocent passage or innocent use, situations which clearly fall outside a conventional right of free navigation such as that in the present case. But even in the case of an innocent use, the writers generally agree that a State cannot establish regulations that limit navigation."

2.71. These observations lack any basis in law and no sources are cited. Indeed, the passage from Wheaton (cited in paragraph 2.1.54 of the *Counter-Memorial*) expressly refers to the "right of innocent passage" being "necessarily modified by the safety and convenience of the State affected by it …" Moreover, the passage from O'Connell[72] does not employ the phrase "innocent use".

2.72. In response to the quotation from Wheaton in paragraph 2.1.54 of the *Counter-Memorial*, Costa Rica comments as follows:

> "3.36 Nicaragua gives the impression that Costa Rica's right established in Article VI of the Treaty of Limits is an 'imperfect right'…

Costa Rica quotes Wheaton's *Elements of International Law*, published just eight years after the conclusion of the 1858 Treaty of Limits. Wheaton wrote that:

> "The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call *an imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected

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[72] *See* NCM, para. 2.1.57.

> by it, and can only be effectually secured by mutual convention regulating the mode of its exercise". (Emphasis added.)

And Costa Rica recalls in paragraphs 3.37 of her *Reply* that Nicaragua comments:

> "It is not suggested that this reasoning is directly applicable to the present case, especially in view of the fact that the right of navigation presently in issue arises from a bilateral Treaty. However, the significant point is presented in the final sentence of the passage which clearly assumes that, *when it exists, a right of navigation for commercial purposes is subject to certain conditions as to the mode of its exercise.*" (Emphasis added.)
>
> Nicaragua's embarrassment about this quotation is understandable. Wheaton mentioned the need of a convention to secure the mode of exercise in regards to such 'right of navigation for the commercial purposes', which is precisely the case of the San Juan River."

2.73. There is no embarrassment in Nicaragua's *Counter-Memorial* on the relevance of this quote. Moreover, the *Reply* is here accepting that a mutual convention, as required by Wheaton, would still govern "the mode of exercise" of the right of navigation.

2.74. The sources when considered as an ensemble justify the conclusion that the right of regulation in legal terms derives both from the provisions of the Treaty of 1858 and from the inherent and logical rights emanating from sovereignty. In her *Counter-Memorial* Nicaragua points out in paragraph 2.158 that at least three types of regulation by the Nicaraguan authorities would be compatible with the principle of free navigation, including the right to monitor the type of vessels exercising the right of navigation and those measures involving questions of security and safety. In Chapter IV of this *Rejoinder*, Nicaragua further demonstrates that the regulatory measures are necessary to defend her sovereign interests in crime prevention, navigational safety, border security and, above all, environmental protection.

2.75. The response of Costa Rica in her *Reply* amounts to little more than a formal denial: and it is a denial which involves the rejection of any regulatory power whatsoever inhering in the territorial sovereign.

2.76. As Nicaragua explained in her *Counter-Memorial*:

> "2.1.63 There are certain materials which, whilst not directly relevant, provide support by way of analogy for the proposition that a right, freedom, or liberty, may be subject to a certain degree of regulation by the sovereign of the territory within which the right, freedom, or liberty is to be exercised. Thus, in the *North Atlantic Coast Fisheries* arbitration (1910), the United States claimed that Great Britain had no right to make regulations for a fishery in which American citizens had been granted 'a liberty to take fish of every kind' by a Convention of 1818. The Tribunal (created by a Special Agreement of 1909) decided that it was lawful for Great Britain to make regulations if they were *bona fide* and not in violation of the Treaty and also if they were: '(1) appropriate or necessary for the protection or preservation of such fisheries, or (2) desirable or necessary on grounds of public order or morals without unnecessarily interfering with the fishery itself; and in both cases equitable and fair as between local and American fishermen ...'"[73]

2.77. The response of Costa Rica in the *Reply* is as follows:

> "3.17 Nicaragua also referred to the Award of the Tribunal of Arbitration in the Question relating to the North Atlantic Coast Fisheries of 7 September 1910. However, its reference to this Award is not clear. Again it is worth quoting the relevant paragraph of this arbitral award in its entirety:

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[73] Parry (ed.), *British Digest of International Law*, Vol., 2b, 1967, p.585 at p.594.

> **'The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said Treaty..."**

2.78. In relation to the first paragraph from the *Reply* it is simply mistaken to suggest that the award is in some way misrepresented. The right to make regulations "must not be in violation of the said Treaty", as the Award states. But this proposition does not defeat the right of Great Britain to make regulations as long as they *"are not inconsistent with the obligation to execute the treaty in good faith, and are therefore reasonable and not in violation of the treaty."* (emphasis added)

2.79. Thus, in this passage, which is adopted by Costa Rica, the Tribunal is expressly accepting that regulations necessary on grounds of public order and morals are *not in violation of the treaty in question.*

2.80. In paragraph 3.18 of her *Reply*, Costa Rica urges upon the Court a distinction between a resource subject to exhaustion, such as fisheries, and navigation "which is not destructive of any natural resource". It is then asserted that free navigation does not need any regulation. This distinction lacks validity both in law and in the sphere of policy. In the first place, navigation is a notorious source of pollution and public order involves both environmental protection and safety of navigation, including avoidance of collisions and other disasters. In any event the concept of free navigation must include the necessary regulation to ensure that navigation is available in conditions of safety, freedom from criminal activity, and freedom from environmental hazards.

2.81. In paragraph 2.1.64 of the *Counter-Memorial*, Nicaragua brought to the fore the implication of the decision of the Court in the *Right of Passage Case* (Portugal v India)[74]. In that case, both Portugal and the Court recognised that the passage was subject to the regulation and control of India. In the *Reply* no attempt is made either to discuss, or to deny, the relevance of this decision of the Court. It is particularly striking that Costa Rica fails to challenge the analogy made by Nicaragua with the right of passage.

H. CONCLUSION: THE PRIMARY OBJECT AND PURPOSE OF THE 1858 TREATY WAS THE DEFINITIVE SETTLEMENT OF A LONG-STANDING DISPUTE CONCERNING TITLE TO TERRITORY

2.82. The evidence available leads to the inevitable conclusion that the primary object and purpose of the 1858 Treaty was the definitive settlement of the long-standing territorial dispute concerning the district of Nicoya and the overall limits of Costa Rica and Nicaragua. The evidence of the specific object and purpose is as follows:

> **(i) The historical context, including several bilateral treaties which form part of the historical context[75].**
>
> **(ii) The nature of the title, and the text of the preamble.**
>
> **(iii) The provisions of the Treaty, including the sequence of the provisions and the ranking of Article VI.**
>
> **(iv) The diplomatic correspondence subsequent to the conclusion of the Treaty[76].**

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[74] ***See ICJ Reports, 1960,* p.6.**

[75] ***See also* NCM, paras. 2.1.36-2.1.39.**

(v) The text of the Cleveland Award of 22 March 1888 and the Report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888[77].

2.83. The treatment of these sources in the *Reply* is incomplete and extremely shallow. Moreover, there are certain admissions in the text of the *Reply*, which have been examined above.

2.84. Given that the Treaty of 1858 recognises the territorial sovereignty of Nicaragua over the river as a whole, it must follow that the right of navigation is necessarily to be reconciled with the existence of Nicaraguan title. Moreover, according to the general principles of international law, Nicaragua has both the right and the duty, as territorial sovereign, to make provision for the safety of navigation and the maintenance of public order.

2.85. The ordinal significance of the interaction of territorial sovereignty and a regime of navigation is well-recognised in the doctrine. The authorities refer to the regulatory power of the riparian State in such circumstances[78].

2.86. The position of contemporary authorities, such as Wheaton, was reflected in the opinions of Governments. This is evidenced by the advice offered to the British Secretary of State, the Earl of Aberdeen, in 1844 by Sir John Dodson[79].

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[76] *See also* NCM, paras. 2.1.22-2.1.24.

[77] *See* NR, Chap. II, Sec. III.

[78] *See* NR, para. 2.69.

[79] *See* International Law Opinions, Vol. 1, 1956, p. 308.

2.87. In addition to these evidences, when essentially similar legal questions were examined by international tribunals their decisions explicitly recognised that a State may exercise a police power in respect of vessels exercising a treaty-based right of free navigation in rivers forming part of its territory. In face of the Awards in the *North Atlantic Coast Fisheries case* and *McMahan (U.S.A.) v United Mexican States* (1929), the Applicant State makes no attempt to deny either their authority or relevance[80].

2.88. In her *Reply* Costa Rica is remarkably reluctant to recognise the force of the evidence, either in its separate manifestations, or as a whole. A careful examination of the individual sources is avoided. "Writers" are invoked but not quoted. In this setting it has been necessary to reaffirm the pertinent elements of the interpretation of the Treaty of Limits and to place its provisions within the appropriate legal perspective.

2.89. Therefore, whatever the nature and extent of Costa Rica's navigation right (which will be addressed in Chapters III through V of this *Rejoinder*), within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua must have the exclusive competence to exercise the following regulatory powers:

(a) The protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation;

(b) The protection of the border, including resort to immigration procedures in respect to foreign nationals navigating in Nicaragua's territorial waters;

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[80] *See* CRR, paras. 3.17-3.18, 3.32.

(c) The exercise of normal police powers;

(d) The protection of the environment and natural resources; and

(e) The maintenance of the Treaty provisions prescribing the conditions of navigation in accordance with the Treaty, that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award.

Section II. The Role of General International Law and Other Particular Rules

2.90. Costa Rica devotes an entire chapter (Chapter II) of her *Reply* to "General International Law Relevant to the Dispute"[81]. The topic does not deserve so much emphasis: while it is certainly true that, in some limited respect, "the rules of general international law apply…"[82], it remains that the case is primarily governed by the Treaty of 1858. Costa Rica's Chapter II is cluttered with rather general and academic developments on the law of international rivers[83] which are of limited relevance for the present purpose.

2.91. As has been shown in Section I above, the 1858 Treaty recognises the territorial sovereignty of Nicaragua over the bed and the waters of the San Juan River. It does so in the first sentence of Article VI. The second sentence, introduced by the word "but" ("*pero*"), constitutes an exception to the usual consequences of the "exclusive dominion and supreme control over the waters of the San Juan River…" ("*exlusivamente el dominio y sumo imperio sobre las aguas del rio de San Juan*"). This exception is constituted by the "right of free navigation" ("*los derechos perpetuos de libre navigación*") on the river with the important stipulations that this right is limited to navigation:

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[81] CRR, paras. 2.01-2.74.

[82] CRR, para. 2.40.

[83] *See e.g.*, the lengthy presentation of the practice of establishing boundaries on riverbanks at paras. 2.21-2.25.

(i) "with articles of trade" ("*con objetos de comercio*") and

(ii) that this commerce be "with Nicaragua or with the interior of Costa Rica" ("*con Nicaragua o al interior de Costa Rica*").

2.92. Nicaragua will come back to these limitations in Chapter III below. In the present Section, she is only concerned with the respective roles of the 1858 Treaty (and of some other more minor instruments) and general international law, and with the relations between the former and the latter for the settlement of the present dispute. And the principles are straightforward:

(i.) the Treaty prevails;

(ii.) however, if it is incomplete or if its meaning is obscure, there can be recourse to other rules of international law.

A. THE TREATY PREVAILS: THE CONTINGENT AND SECONDARY RELEVANCE OF GENERAL INTERNATIONAL LAW

2.93. Whatever their content may be, the rules of general international law which might be applicable to a similar case are not peremptory: they would apply insofar as the States in question have not accepted special rules – which can be derogatory to said general rules. For this reason, the legal qualification of the situation is of rather little importance.

2.94. Costa Rica pays great attention to the issue of the definition of an international river. According to her, the San Juan River would be an international river for three cumulative reasons: "(i) the presence of different riparians ; (ii) the fact that the watercourse, if navigable, offers access to and from the sea to more than one State ; and (iii) the existence of a treaty regime"[84]. It might well be so – but it does not really matter since, whatever the general rules applicable to international watercourses, the 1858 Treaty must prevail, as Costa Rica acknowledges from time to time[85]. But, in doing so, she does no more than pay lip service to the principle of *lex specialis*.

2.95. Thus, Costa Rica writes, "[r]egarding navigation ... any recourse to customary law is contingent on the *lex specialis* resulting from the 1858 Treaty, as interpreted by the 1888 Cleveland Award and the 1916 Judgment of the Central American Court of Justice"[86]. Nicaragua denies the relevance of the 1916 Judgment in the present case[87], but leaving this aside for the moment, it is revealing that, while she seems to accept the principle of *specialia* [here the rules in the 1858 Treaty] *generalibus* [here general international law rules] *derogant*, Costa Rica goes to great lengths to base her right of navigation on the San Juan River on general international law.

2.96. In this respect, she attaches great importance to an allegedly "truncated version" of a quote from a writer (Professor Lucius Caflisch) commenting upon the *Faber* case decided in 1903 by the German-Venezuelan Claims Commission[88]. The alleged "truncating" is a venial sin: it has no bearing on the meaning of the sentence (and it is the reason why Nicaragua indulged herself not to reproduce the phrase in question which attributes to the Umpire an alternative position, where the only purpose of the quote was to contrast two positions; moreover the learned author interprets "freely" what the Umpire effectively said[89]). Now, leaving aside these pettifogging quibbles, both the decision in the *Faber* case and Professor Caflisch's comment are of interest regarding Costa Rica's alleged rights of navigation under general international law.

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[84] CRR, p. 28, para. 2.35.

[85] *See e.g.*, CRR, para. 2.08 or para. 2.58.

[86] CRR, p. 19, para. 2.15.

[87] *See* NR, paras. 2.124-2.128.

[88] *See* CRR, paras. 2.16-2.17.

2.97. As was usual at the time, the Award includes the opinions of the Commissioners. In the instant case, one of the Commissioners (Goetsch) wrote:

> "In the first place it is undeniable that a sovereign state holds absolute authority over its rivers and water courses until these touch the frontiers of other states. This principle is nevertheless limited in two senses by international law. When a river constitutes the only way of communication, indispensable for the subsistence of another nation, or part of it, its use can not be entirely prohibited."[90]

For his part, Commissioner Zuloaga considered that, "[t]ransitory commerce can therefore be prohibited by Venezuela at any time, as she is not obliged by any treaty to permit it. (…) Venezuela, as a sovereign nation, regulates this commerce in transit in its territory as it sees fit"[91], and that "[t]he theory that navigable international rivers are free to navigation has not been admitted as a general rule of the law of nations. No nation up to now has recognized this absolute principle or this obligation as a perfect one, and in the cases where it has been agreed to by nations it has always been by virtue of special treaties"[92]. Umpire Duffield clearly concurred with this last opinion: "To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela"[93]; then, quoting Woolsey, who terms the alleged right of navigation on international rivers "only a moral or imperfect right to navigation", the Umpire adds: "However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists [whose opinion is analyzed at length in the Award], spoken generally, seem to agree in holding that the right can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made '*must be the sole judge* as to whether it is innocent or injurious in its character' (Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International Law, Hesty's Law of Nations, Wolff's Institutes, Vattel)"[94].

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[89] *See* the Award of 1903, *Faber* case, *RIAA*, vol. X, p. 462 – fn. 97.

[90] *Ibid.*, p. 444.

[91] *Ibid.*, p. 447.

[92] *Ibid.*, p. 449.

2.98. It is therefore not really true that "la sentence arbitrale dans l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIXe siècle, et la conception latinoaméricaine, qui fait dépendre la navigation de la volonté de l'État riverain ou des États riverains."[95] Nor indeed is it entirely true that, "[c]ette conception semble du reste l'emporter sur la thèse subsidiaire qui fut développée par le surarbitre Duffield et qui consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci"[96]. In reality, the position of the Umpire is clearly in favour of the first of those two theses; and the alleged "subsidiary thesis" is not at all presented as an alternative to the former one but as concerning the different question "of regulating commerce, rather than restricting internal navigation"[97].

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[93] *Ibid*, p. 457.

[94] *Ibid.*, p. 466 (italics in the text).

[95] L. Caflisch, « Règles générales du droit des cours d'eau internationaux », *Recueil des cours*, 1989, Vol. II19, p. 125.

[96] *Ibid.*

2.99. What, on the other hand, is clearly true, is the conclusion arrived at by Professor Caflisch: "La doctrine, quant à elle, semble à peu près unanime : en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle"[98]. This is confirmed by the careful examination of the authorities by Umpire Duffield[99] – who does not limit his conclusion to Latin America but shows that "[f]rom this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce [wherever situated] the weight of authority sustains the right of Venezuela to make the decrees complained of"[100].

2.100. In other words, general international law, as presented by more or less contemporaneous authorities, does not help Costa Rica, not only is it supplanted by the 1858 Treaty which introduces a qualified right of "free navigation" in favour of Costa Rica, but also, if it were to apply, it would not recognize *any* right of navigation in her favour: the principle would be (and only be) that of the absolute authority of the sovereign State (here Nicaragua) over the waters of her river (here the San Juan).

2.101. At this stage, Costa Rica's fallback position is to claim that the limit fixed by the 1858 Treaty, being a limit on the shore, is a "bad" boundary:

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[97] Award of 1903, *Faber* case, *RIAA*, vol. X, p. 462.

[98] L. Caflisch, *op. cit.* fn. 95, p. 125.

[99] *See* Award of 1903, *Faber* case, *RIAA*, vol. X, pp. 463-466.

[100] *Ibid.*, p. 466.

> - "The great injustice of this type of boundary (...) is that one of the border States is excluded from the use and exploitation of the river"[101];
>
> - "The effect of placing an international boundary on the shore of a *navigable* river may be particularly dramatic..."[102];
>
> - "Limits on the shore cannot be considered 'good' boundaries because they tend to generate conflict rather than to promote peaceful coexistence"[103].

2.102. These are extraordinary allegations before a Court, "whose function is to decide in accordance with international law". Two remarks are in order.

2.103. *First*, these limitations "imposed" on Costa Rica on the use of the river by the lawfully concluded Treaty of Limits of 1858 were agreed in exchange of the concession of enormous compensations -- of which the granting of qualified rights of free navigation was not the main part. In reality, in exchange for this supposedly unfavourable limit, Costa Rica gained sovereignty over the district of Nicoya -- an advantage which was the main *quid pro quo*, compensating with largesse the placing of the border at the bank[104]. There is nothing "inequitable" in this agreement, which can be seen as largely in favour of Costa Rica.

2.104. *Second*, and more importantly from a legal point of view, Costa Rica does not contend that the 1858 Treaty is unlawful or invalid for any reason. It must then be applied as it stands, with all its consequences. In particular, Costa Rica must accept that:

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[101] CRR, p. 26, para. 2.28, quoting L.J. Bouchez, "The Fixing of Boundaries in International River Boundary Rivers", 12 *International and Comparative Law Quarterly* 1963, p. 792.

[102] *Ibid.*, para. 2.30.

[103] *Ibid.*, para. 2.31.

[104] *See* NCM, paras. 1.2.2-1.2.4 and paras. 1.2.13-1.2.23; *see also* NR, paras. 2.13-2.19.

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- "[t]he relevant line between the two Republics (…) shall run along the right bank" of the San Juan de Nicaragua river (Article II);

- The Republic of Nicaragua has "exclusively the dominion and supreme control (*sumo imperio*) over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic" (Article VI), with the exception that ("but"):

- the Republic of Costa Rica has the "right of free navigation (…), said navigation being '*con objetos de comercio*' either with Nicaragua or with the interior of Costa Rica…" (Article VI).

2.105. Therefore, Costa Rica must accept that she only enjoys this last freedom, which clearly is an exception to the otherwise generally applicable rules when a river border is placed at the bank. As explained by Bouchez, with the apparent approval of Costa Rica, in the absence of any contrary express provision in a treaty, the State which does not possess the waters "is excluded from the use and exploitation of the river"[105].

2.106. As shown above[106], the real issue is not to interpret restrictively the freedom of navigation conceded to Costa Rica by the 1858 Treaty, but simply to interpret the Treaty in conformity with the usual canons of treaty interpretation as set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Once this interpretation has been made[107], general international law applies and, whether on the basis of a non-existent right of navigation or on that of the special law applicable when a border is fixed on the bank of a river, Costa Rica has no right on the San Juan outside the right of qualified freedom of navigation that she holds under the Treaty. Consequently, whether the river is "international" -- as Costa Rica insistently alleges[108] -- or not, or whether the San Juan is "a boundary river" -- as she strongly emphasises too[109] -- or not, does not matter; what does matter for the settlement of the present dispute is that the border follows the right (Costa Rican) bank and that the bed and the waters of the river are under the sovereignty of Nicaragua.

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[105] *See* NR, para. 2.101.

[106] *See* NR, para. 2.55.

[107] *See* NR, Chapter III.

B. OTHER APPLICABLE RULES

1. Relevant Customary Rules

2.107. As already indicated[110], Nicaragua fully accepts that "customary international law is (…) relevant to adjudication of the present dispute and to the interpretation of the relevant treaty provisions", with the important qualification that "any recourse to customary law is contingent on the *lex specialis* resulting from the 1858 Treaty…"[111]. In other words, that the Treaty, exactly as any treaty, does not apply in isolation. It is grounded in general international law which can clarify its terms if they are obscure or disputed, or complement them when they are silent. In other words, when properly interpreted in conformity with the usual rules of interpretation in international law, it can only be completed, but not contradicted, by customary international law.

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[108] Cf. CRR, paras. 2.02-2.40, and especially paras. 2.34-2.36.

[109] Cf. CRR, paras. 2.19-2.33.

[110] *See* NR, paras. 2.17 and 2.56.

[111] CRR, para. 2.15.

2.108. Concerning the first of these functions of general international law, as recalled above[112], both parties agree that the "general rule of interpretation" together with the "supplementary means of interpretation" as described in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties apply for the purpose of the interpretation of the 1858 Treaty, and in particular to clarify the meaning of the expression "freedom of navigation with articles of trade" (*libre navigación ... con objetos de comercio*). There is no need to reconsider the issue of whether the general rule and the supplementary rules of interpretation are applicable. Both parties apply them to support their interpretations of the phrase "*con objetos de comercio*". Nicaragua further addresses the issue of interpretation of this phrase in Chapter III of this *Rejoinder*.

2.109. It should not be necessary to emphasize again that besides this qualified freedom of navigation, the general applicable principles are a duty of abstention (or, to put it otherwise, no right on the river) for Costa Rica contrasted with an otherwise unlimited territorial sovereignty of Nicaragua on the waters of the river. As Costa Rica recognises: "No one disputes [Nicaragua's] sovereignty over the waters of the San Juan river"[113].

2.110. This being said, while a State cannot abandon its sovereignty, unless it accepts to disappear as a State, nothing impedes a sovereign State from freely limiting its sovereign rights over its territory (as Nicaragua did by granting a right of navigation, with limitations, to Costa Rica in Article VI of the 1858 Treaty). But here arises the principle according to which, when a State has agreed to submit to a limitation on the exercise of its sovereign rights over its own territory, as is the case here, "[t]his fact constitutes a sufficient reason for the restrictive interpretation in case of doubt, of the clause which produces such a limitation"[114].

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[112] *See* NR, paras. 2.25-2.35.

[113] CRR, para. 2.61.

2.111. It is of course not an answer to state, as Costa Rica does, that this argument "has no value, because the wording of Article VI of the Treaty of Limits is clear"[115]. Indeed the expression "*con objetos de comercio*" is clear, but it is contested by the Applicant – as more than amply shown by the lengthy arguments exchanged on this crucial point by the parties before and during the present proceedings; and the real scope of the expression "free navigation" ("*libre navegación*") itself is disputed. Hence the need to have recourse to interpretation.

2.112. As Nicaragua explained in her *Counter-Memorial*, "[*m*]*utatis mutandis*, this situation may be compared with that of a right of passage of States on the territory, or within the territorial sea, or in an international canal in the territory of another State"[116]. This has not been challenged by Costa Rica, which has not criticized the analysis made by Nicaragua of the *Judgment* in the *Right of Passage* case[117], which shows that such a right is not unqualified under international law and is, in particular, subordinated to the "power of regulation and control" of the territorial State[118].

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[114] PCIJ, Judgment of 17 August 1923, *Wimbledon*, Series A, n° 1, p. 24; *See* also the PCIJ Advisory Opinion of 21 November 1925 in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Series B, n° 12, p. 25, invoked by Costa Rica herself (CRR, para. 2.62).

[115] CRR, para. 2.63.

[116] NCM, para. 3.3.8.

[117] *See* NCM, paras. 2.1.64 and 3.3.8.

[118] Judgment of 12 April 1960, *ICJ Reports* 1960, p. 45.

2.113. It is the very purpose of the concept of territorial sovereignty to establish that the territorial State exclusively and fully possesses and exercises all the rights that it has not freely limited in favour of another State. This has been very clearly stated by Max Huber in his celebrated dictum, in the *Island of Palmas* arbitration, "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory"[119]. And as the Arbitral Tribunal aptly considered in the *Lake Lanoux* case, "La souveraineté territoriale joue à la manière d'une présomption. Elle doit fléchir devant toutes les obligations internationales, quelle qu'en soit la source, mais elle ne fléchit que devant elles"[120]. As a consequence, in the present case, unless Costa Rica can positively show that other rules do apply, there is no room for any further limitation on Nicaragua's sovereignty than that resulting from Article VI of the Treaty, when this provision is properly interpreted.

2. *The "Instruments" Invoked by Costa Rica*

2.114. Costa Rica puts forward a single rule of customary origin and a small handful of written instruments which would allegedly make the "presumption" linked to the territorial sovereignty of Nicaragua bend before them. As for the alleged customary rule (introduced as "related rights" – in the plural[121]), it relates to fisheries and will be dealt with below, in Chapter IV. Leaving aside the Cleveland Award of 1888 and the Alexander Awards, which are relevant for the interpretation of the 1858 Treaty, Costa Rica mentions three other instruments, which, from her point of view, would be relevant for the settlement of the present dispute:

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[119] Arbitral Award, 4 April 1928, *RIAA*, vol. II, p. 838.

[120] Arbitral Award, 16 November 1957, *RIAA*, vol. XII, p. 301 ("Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations." [53 *AJIL* 1956, at 159]).

- the Fournier-Sevilla Agreement of 9 January 1956;
- the Cuadra-Castro Joint Communiqué of 8 September 1995; and
- the Cuadra-Lizano Joint Communiqué of 30 July 1998[122].

The 1916 Judgment of the Central American Court of Justice is also invoked by Costa Rica but it is by no means relevant for the present case, as will be explained below.

(a) The 1956 Fournier-Sevilla Agreement

2.115. Leaving aside the unwelcome and superfluous remark made at the end of paragraph 2.11 of the Costa Rican *Reply*, the 1956 Fournier-Sevilla Agreement[123] adds nothing to the 1858 Treaty as interpreted by the Cleveland Award, contrary to Costa Rica's allegations[124]. To demonstrate this, it will suffice to quote the text of two provisions of this Agreement invoked by the Applicant in support of her allegation.

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[121] *See* CRR, para. 2.15.

[122] *See* CRR, paras. 2.11-2.14.

[123] *See* Costa Rica-Nicaragua Agreement pursuant to Article IV of the Pact of Amity, 9 January 1956. CRM, Vol. II, Annex 24.

[124] *See* CRR, para. 2.11.

2.116. Article I provides:

> "The two Parties, acting in the spirit which should move the members of the Central American family of nations, shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other."[125]

This provision expressly invokes "the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888" and it clearly adds nothing to those terms.

2.117. For its part, Article II provides:

> "The two Parties shall, in so far as possible and with the utmost diligence, arrange for the supervision of their common border as a means of preventing the illegal entry of either weapons or armed groups from the territory of one of the Parties into the territory of the other. The authorities of the two Governments, and, in particular, the border authorities, shall exchange, as fully as possible, any information which may come to their attention and which might help to avoid such incidents."

According to Costa Rica – which, carefully, does not quote this provision: "This could only be done, on the part of Costa Rica, by allowing its police to navigate on the River with normal arms and on the basis of an ability to re-supply Costa

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[125] It might be noted that this Agreement dated 1956 only took into consideration the 1858 Treaty and the Cleveland Award of 1888 attributes no relevance to of the then more recent decision of the Central American Court in 1916. *See* NR, para. 2.125.

Rica's border posts"[126]. Nothing in the text or the spirit of Article II implies such a conclusion. The only precise means of cooperation which is provided for is mutual information. Moreover, even accepting Costa Rica's audacious interpretation according to which this provision amounts to an agreement "to cooperate to safeguard their common border"[127], this certainly does not imply armed navigation or re-supplying border posts through the river on the part of Costa Rica; this can perfectly (and must) be done on and from the land itself. In any case, this is clearly a typical case where the presumption in favour of territorial sovereignty must fully apply.

(b) The 1995 Cuadra-Castro Joint Communiqué

2.118. The second "relevant text" -- to be noted: "text," not a treaty – invoked by Costa Rica is the 1995 Cuadra-Castro Joint Communiqué[128]. According to the description given by Costa Rica, this instrument "refers to far-reaching cooperation for the joint or parallel surveillance of the common border. That such cooperation would not be possible without the assistance of Costa Rican public vessels is evident"[129]. In reality, as Nicaragua has indicated in her *Counter-Memorial*, this communiqué is nothing more than "a commitment to cooperate"[130]:

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[126] CRR, para. 2.11.

[127] *Ibid.*

[128] Cuadra-Castro Joint Communiqué, 8 September 1995. CRM, Vol. II, Annex 27.

[129] CRR, para. 2.12 (footnote omitted).

[130] NCM, para. 3.2.9.

- point one calls for "coordination" and parallel patrolling at the border of both countries;

- point two envisages that "the chiefs of the border units will coordinate and cooperate more closely in planning and carrying out joint parallel patrolling along our countries' common border, exchanging operative information of the common entities involved";

- according to point three, "[b]oth institutions will coordinate the training of guides and canine technique in each country's national centres…"; and

- point four provides for various meetings.

2.119. Even accepting that the signatories could commit their respective States in matters relating to the boundary regime (which in the Nicaraguan case was not legally possible), it is indeed impossible to interpret those four points as an agreement given by Nicaragua to Costa Rica for a unilateral right to navigate on the San Juan with public vessels, thus clearly derogating from the 1858 Treaty as interpreted by the 1888 Award, and limiting again Nicaragua's sovereignty over the river. Nowhere in the communiqué is Costa Rican Civil Guard navigation on the river mentioned, expanded or approved – in fact, the San Juan River is not mentioned at all. This document did nothing more than clarify in writing the existing collaborative relationship between the Nicaraguan and Costa Rican security forces in the border area, premised on the desire to exchange information, coordinate law enforcement efforts, and continue parallel patrols. As stated by Brigadier General Denis Membreño Rivas, the Commander of the Nicaraguan Military Detachment at the time this communiqué was signed:

> "From my first day at the Southern Military Detachment in February 1992 until my departure at the end of December 1995, our relations with the Costa Rican security personnel were very good. From time to time, my Detachment

> coordinated operations against crime with the Guardia Civil, where in a parallel manner we would travel the relevant sector of the border, them from their territory and us navigating the San Juan River. These efforts were primarily focused on the prevention of illegal activities or rescuing shipwreck victims. The Costa Rican security personnel never navigated on the river without first requesting authorization from my Detachment"[131].

2.120. The communiqué did nothing to expand Costa Rica's navigation rights as provided under the Treaty of Limits or the Cleveland Award. Pursuant to the communiqué, which put in writing the procedures that had previously been adopted informally by the respective military commanders in the area, patrolling of the border area for law enforcement purposes was coordinated and carried out in parallel. The evidence shows that Costa Rican security personnel only used the river after seeking and obtaining prior authorization by Nicaragua. As shown in Chapter V below[132], Costa Rican security personnel have not patrolled the San Juan River for law enforcement purposes, or carried out law enforcement actions on the River, except on those infrequent and short-lived occasions when they were expressly authorized by Nicaragua to do so, and in conformity with the conditions and time limitations imposed by Nicaragua. At most, the Cuadra-Castro Communiqué is an authorization by Nicaragua for Costa Rican security personnel to use the river for limited purposes, subject to specific conditions. As sovereign over the river, it is Nicaragua's prerogative to issue such authorizations, which would not have been necessary had Costa Rica enjoyed a right to engage in the authorized activity. Consequently, the Cuadra-Castro Communiqué is evidence not of Costa Rica's right to navigate on the San Juan

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[131] Affidavit of Brigadier General Denis Membreño Rivas, 10 March 2008 (hereinafter "Membreño Affidavit"): NR, Vol. II, Annex 73.

[132] *See* NR, paras. 5.65, 5.77, and 5.80-5.84.

River with law enforcement vessels, but exactly the contrary. It is evidence of Costa Rica's lack of such right.

(c) The 1998 Cuadra-Lizano Joint Communiqué

2.121. The last relevant instrument, according to Costa Rica, would be the 1998 Cuadra-Lizano Joint Communiqué[133], which, according to the Applicant "confirms the right of Costa Rican police officers to navigate on the San Juan"[134]. As already explained in some detail in the *Counter-Memorial*[135], this alleged "agreement", which has never been officially published anywhere, whether internally or, *a fortiori*, by the Secretariat of the United Nations, was declared null and void by the Government of Nicaragua less than two weeks after its creation (on 11 August 1998)[136].

2.122. To fully understand the inherent limitation of the document, it is useful to describe the context in which it was concluded. The communiqué was signed by the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security in an attempt to assuage the tension between the two nations during the height of the diplomatic crisis in July 1998 – following Costa Rica's illegal arrests of Nicaraguans on the San Juan River and Nicaragua's resultant prohibition of Civil Guard navigation. During that meeting, the two Ministers prepared a joint communiqué, in which both parties manifested that Civil Guard boats could re-supply their posts via the river, after giving the required notice, carrying only their small arms, reporting at each Nicaraguan military post passed, and accompanied by a Nicaraguan military escort[137]. In essence, the document restored the practice which the Nicaraguan military had permitted at times in the past, but had stopped authorizing in July 1998. However, when the communiqué left the high-pressure meeting room and was objectively evaluated by the Nicaraguan Congress and Executive, the relevant legal authorities quickly realized that the hastily concluded communiqué had been executed in clear violation of the Nicaraguan Constitution and was invalid[138].

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[133] *See* Cuadra-Lizano Joint Communiqué, 30 July 1998. CRM, Vol. II, Annex 28.

[134] CRR, para. 2.13.

[135] *See* NCM, paras. 3.2.9-3.2.12.

[136] *See* Letter of the Nicaraguan acting Minister of Foreign Affairs to the Costa Rican Minister of Foreign Affairs and Worship of 11 August 1998. CRM, Vol. III, Annex 49.

2.123. In this regard, the Cuadra-Lizano Communiqué is similar to the earlier Cuadra-Castro Communiqué but even less relevant. At most, both were express authorizations by Nicaragua for Costa Rican public vessels to navigate on the San Juan River for specified purposes and subject to conditions providing for strict limitation and control by Nicaragua – authorizations that would not have been necessary if Costa Rica had already possessed the right to engage in the specified activities, and conditions that were totally contradictory to Costa Rica's putative possession of such a right. Beyond this, the Cuadra-Lizano Communiqué was never a binding international legal document, nor did it create any rights of navigation for Costa Rican public vessels beyond the limited privileges that Nicaragua had chosen to grant in some previous moments of positive relations.

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[137] *See* Resolution of the Republic of Nicaragua's National Assembly on the Cuadra-Lizano Joint Communiqué, 18 August 1998. NCM, Vol. II, Annex 68.

[138] The joint communiqué violated the Constitution of the Republic of Nicaragua, as discussed in NCM, para 3.2.12, as well as the following articles:

Article 92: "…The transit or stationing of foreign military ships, aircraft and machinery may be authorized for humanitarian purposes, always provided that such authorization is requested by the Government of the Republic and ratified by the National Assembly;"

Article 130: "No appointment grants, to that who exercises it, additional functions than those conferred to by the Constitution and the laws…All government officials from the State must provide an accounting of his or her assets before assuming a position and after the term is completed. The law regulates this matter." NR, Vol. II, Annex 54.

Finally, as already discussed, the communiqué was declared null and void – and therefore lacks any legal force.

3. *The 1916 Judgment of the Central American Court of Justice*

2.124. Costa Rica insists in her *Reply* on the relevance of the decision of the Central American Court of Justice to the issues now before the Court[139]. In fact, as pointed out in the *Counter-Memorial*[140], this judgment has no relevance whatsoever to the present case. The questions at issue before the Central American Court are completely unrelated to those before this Court. The 1916 case did not concern the extent of Costa Rica's navigational rights on the San Juan River but only, as the Court emphasized, the conclusion of a treaty between Nicaragua and the United States relating to the construction of an inter-oceanic canal[141]. The Central American Court purported to do no more than look to the 1858 Treaty and the Cleveland Award as the legal framework governing the San Juan. It certainly did not purport to enlarge or affect in any way Costa Rica's rights under those instruments.

2.125. In 1916, Costa Rica was not claiming any rights to navigate with state vessels with armed men on board, nor was she claiming any rights to bring foreign and national tourists to view the sights (on the Nicaraguan side, since on the Costa Rican side there is mainly farm land) along the San Juan River. What Costa Rica claimed before the Central American Court was that when Nicaragua entered into a treaty with the United States of America in 1914 (Chamorro-Bryan) giving that State an option to build a canal across Nicaraguan territory, she violated her obligation to first consult with Costa Rica in accordance with Article VIII of the 1858 Treaty and Paragraphs 10 and 11 of the Cleveland Award. Costa Rica furthermore alleged that since the treaty ceded parts of the territory of Nicaragua to the United States, it violated the rights of Costa Rica and those of the rest of the States of Central America, stipulated in the General Treaty of Peace and Amity agreed to by all the Central American States in 1907 in Washington, D.C.

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[139] *See* CRR, para. 2.10.

[140] *See* NCM, para. 3.2.6.

[141] *See Republic of Costa Rica v Republic of Nicaragua*, Central American Court of Justice, Opinion and Decision of the Court (11 *AJIL*, 1917). CRM, Annex 21, p. 122.

2.126. The decision of the Central American Court was limited to these issues. It declared:

> "that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty of Limits of April fifteen, eighteen hundred and fifty eight, by the Cleveland Award of March twenty-second, eighteen hundred and fifty-eight, and by the Central American Treaty of Peace and Amity of December twentieth, nineteen hundred and seven"[142].

2.127. Any wording of that Judgment that might be construed to refer to Costa Rica's other rights in the 1858 Treaty or the 1888 Award are at most *obiter dicta* and even these *dicta* are general statements paraphrasing loosely the wording of those same documents. The Central American Court had no authority to review or add anything to the 1858 Treaty as interpreted by the Cleveland Award; nor did it attempt to do so.

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[142] CRM, Vol. II, Annex 21 (*AJIL* 1917, p. 229).

2.128. The Central American Court of Justice consisted of five Judges appointed by the legislative bodies of each of the five member States. "Unfortunately," as Hudson points out, "the judges of the court seem to have been looked upon not as international officials of all five States, but as officials of their respective States"[143]. And more unfortunately for Nicaragua, the Chamorro-Bryan Treaty she had entered into with the United States was hotly rejected by the other four member States. Three of them, Costa Rica, Honduras and El Salvador, had sent notes of protest to the United States[144]. In simple terms, all the Judges were pronouncing on a question that involved the national interests of each of their own States vis-à-vis Nicaragua. But even in this inevitable 4 to 1 decision, the Central American judges were not deciding any of the issues presently before the Court.

Section III. The Scope of the Cleveland Award

2.129. Costa Rica accepts that the applicable law consists of the 1858 Treaty as interpreted in the 1888 Cleveland Award, but she mischaracterizes Nicaragua's position on the Cleveland Award and reads much into the Award that is simply not there. This section will distinguish between what questions were decided in the Cleveland Award and what questions were not, and show why Costa Rica's attempted use of the Cleveland Award to support her case is entirely misplaced.

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[143] **M. Hudson, *The Permanent Court of International Justice*, Macmillan, New York, 1943, p. 46.**

[144] ***See AJIL* 1917, p. 192.**

A. THE CLEVELAND AWARD LIMITED COSTA RICA'S RIGHTS TO NAVIGATE THE SAN JUAN WITH PUBLIC VESSELS

2.130. The Court will recall that in paragraph *Second* of his award, President Cleveland found that Costa Rica

> "has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[145]

2.131. As the text makes clear, the Arbitrator decided two issues: *First*, whether Costa Rica has the right of navigation on the San Juan with vessels of war; and *second*, whether she has the right of navigation on the river with vessels of the revenue service. The Arbitrator answered the first question clearly and emphatically in the negative.

2.132. As to the second question, President Cleveland was doubtless aware that a revenue vessel, or cutter, could be made to be the functional equivalent of a vessel of war – at least one that would be capable of navigating on a rather small river like the San Juan, its tributaries and distributaries (such as the Colorado River). The publication referred to by Costa Rica, *U.S. Coast Guard and Revenue Cutters, 1790-1935*, by Donald L. Canney[146], leaves no doubt that contemporary versions of these revenue vessels could be quite formidable. Thus, if the Arbitrator were going to permit navigation by Costa Rican revenue vessels he would have to do so in a way that prevented such craft from evolving into what were effectively vessels of war, thus rendering meaningless his holding on the first question.

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[145] Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (hereinafter "Cleveland Award"), para. *Second*. CRM, Vol. II, Annex 16.

[146] Naval Institute Press, Annapolis, Maryland, 1995. Costa Rica refers to this publication in CRM, para. 4.81.

2.133. President Cleveland therefore answered the second question quite carefully. The Court will note that he did not simply say "but she may navigate said river with vessels of the Revenue Service," which he certainly had the authority to do had he found that this conformed with the text and spirit of the Treaty. Instead, the Arbitrator placed clear restrictions upon navigation by Costa Rican revenue vessels, so that he would not effectively give back something he had just taken away in prohibiting navigation by Costa Rican warships. He imposed these restrictions by tying any navigation by Costa Rican revenue vessels to the exercise of another right Costa Rica enjoyed under the 1858 Treaty (a right that was not at issue in the arbitration). Thus, President Cleveland limited navigation on the San Juan River by Costa Rican revenue vessels to that which is "related to and connected with her enjoyment of the '*objetos de comercio*' accorded to her in [Article VI of the 1858 Treaty], or as may be necessary to the protection of said enjoyment."

2.134. Nicaragua referred to this statement by the Arbitrator in her *Counter-Memorial* in the following words:

> "For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is 'related to and connected with' the right to navigate with articles of trade."[147]

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[147] NCM, para. 3.1.54.

2.135. In her *Reply*, Costa Rica, referring to this passage of the *Counter-Memorial*, accuses Nicaragua of "misrepresent[ing] the language used by President Cleveland in the 1888 Award"[148]. Costa Rica makes this serious accusation simply because, in paraphrasing the arbitrator's finding, Nicaragua used what in her view is the correct translation of "*objetos de comercio*" – articles of trade – a translation that is used throughout the *Counter-Memorial*. Costa Rica does not complain about the words Nicaragua placed in quotation marks -- and correctly attributed to President Cleveland-- "related to and connect with". These quoted words, not "*objetos de comercio*" or articles of trade, were the focus of the section of Nicaragua's *Counter-Memorial* in question – and of the relevant portion of paragraph *Second* of the Cleveland Award.

2.136. The history of the case leading up to President Cleveland's 1888 Award still further evidences the limits the Arbitrator intended to impose on Costa Rica's public navigation on the San Juan. As the Court is aware, the mandate for the Cleveland Arbitration was contained in the Treaty signed by both parties at Guatemala City on 24 December 1886. Article I of this Treaty submitted to arbitration the validity of the 1858 Treaty. It further provided in Article VI that if the Treaty was declared valid, then "the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decision aforesaid shall, in case of the validity of said Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty…"[149]

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[148] CRR, para. 1.09.

[149] CRM, Vol. II, Annex 14, p. 88.

2.137. Nicaragua accordingly communicated eleven points it considered to be of doubtful interpretation. Question Number Eight (8) posed by Nicaragua asked:

> **"If Costa Rica, who, according to Article VI of the Treaty, has only the right of free navigation for the purposes of commerce in the waters of the San Juan River, can she also navigate with men-of-war or revenue cutters in the same waters?"[150]**

2.138. The answer Costa Rica gave in her opening submission to President Cleveland was not at all surprising. It began "by calling the attention of the arbitrator to the fact that the word *only*...does not occur in Article VI of the treaty of limits."[151] (Emphasis in original). After quoting Article VI, Costa Rica then added the following rhetorical question (which it naturally answered in the negative):

> **"Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?"[152]**

2.139. This passage is critical with regard to two of the most central points before the Court today. *First*, it shows that Costa Rica understood that, literally, the words "*con objetos de comercio*" mean -- exactly as Nicaragua has always maintained -- "with articles of trade," or, as Costa Rica put it, "transportation of merchandise". This language will be discussed further in Chapter III of this *Rejoinder*.

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[150] ***Argument of Costa Rica, op. cit.*, p. 155. NR, Vol. II, Annex 5.**

[151] ***Ibid.***

[152] ***Ibid.***

2.140. The *second* critical point has to do with Costa Rica's contention before the Court today that she has the right under the Treaty and the award to navigate on the San Juan with virtually every kind of public vessel except warships, *stricto sensu*. It will be evident from the passage set forth above that Costa Rica made the same argument before President Cleveland, in the form of a rhetorical question, requesting the Arbitrator to decide that apart from the "transportation of merchandise", as she described it, she also had the right to navigate with all types of public vessels. Thus, the issue was presented quite clearly to the Arbitrator.

2.141. The Award of President Cleveland on this point leaves no doubt about his response. Under paragraph Second of his award, he decided that Costa Rica's public vessels had no right to navigate on the San Juan River -- except only that vessels of her revenue service could to the extent, and only to the extent "related to and connected with her enjoyment of the "purposes of commerce" accorded to her in Article VI of the 1858 Treaty, or as may be necessary to the protection of said enjoyment"[153].

2.142. President Cleveland clearly did not accept Costa Rica's contention that she could navigate with "any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise"[154]. Yet now, 120 years after the Cleveland Award, Costa Rica is insisting that the Court reverse that award and adjudge and declare that Nicaragua has

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[153] *See* Cleveland Award, *op. cit.*, para. Second. CRM, Vol. II, Annex 16, p. 98.

[154] *See Argument on the Question of the Validity of the Treaty of Limits Between Costa Rica and Nicaragua and Other Supplementary Points Connected With It, Submitted to the Arbitration of the President of the United States of America, Filed on Behalf of the Government of Costa Rica*, 1887 (hereinafter "Argument of Costa Rica"), p. 155. NR, Vol. II, Annex 5.

> **"the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular article 2 of the Cleveland Award."[155]**

2.143. Nicaragua respectfully requests the Court to see this submission of Costa Rica for what it is: an effort to obtain in the early 21st century what she tried unsuccessfully to obtain in the late 19th century. The Court should consider this matter to be *res judicata*.

2.144. The practice of the parties subsequent to the 1858 Treaty but before the Cleveland Award is also consistent with the decision of the Arbitrator, as can be seen in the documents that were annexed to the Costa Rican Arguments during the Arbitration.

2.145. One of the annexes filed by Costa Rica consists of a note sent by Nicaragua on 23 April 1863 whereby she cautioned Costa Rica that some violence was anticipated from foreigners who "are accessories to the piratical and filibuster outrage"[156] that had recently been perpetrated. For this reason, Nicaragua suggested that Costa Rica "cause some forces to be stationed at Sarapiquí to meet *on that side* any emergency that the same events might occasion there"[157] (emphasis added).

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[155] **CRM, Submissions, 2 (g), p. 147.**

[156] ***See* Argument of Costa Rica, *op. cit.*, p. 242. NR, Vol. II, Annex 5.**

[157] ***See ibid.*, p. 243.**

2.146. Even in this case of anticipated danger, coming soon after the Filibuster Wars, Costa Rica was asked only to "meet *on that side*" – i.e., on the Costa Rican bank of the river – any further emergency. She was not asked to patrol the river itself.

2.147. Another telling point regarding how the parties understood the rights conferred on Costa Rica by the 1858 Treaty can be appreciated in a Costa Rican Decree of 28 April 1869 prohibiting, in Article 1, the export through the San Juan River of lumber and other resources of the forests. In Article 3, it established revenue posts in each point of intersection of the San Carlos and Sarapiquí rivers with the San Juan River[158].

2.148. Two points are interesting about this decree. The *first* is that nowhere does it indicate that revenue patrols are to navigate the San Juan in search of contraband. The mandate is only for revenue stations on the Costa Rican side of the border.

2.149. The *second* point is that it is evident from the decree that even as far back as 1869 there was a problem of contraband lumber and other natural resources of the forests that had to be controlled. One hundred and forty years later, with the intense deforestation occurring everywhere and quite noticeably on the Costa Rican side of the border, it is unreasonable to claim that Nicaragua has no right to

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[158] *See Reply to the Argument of Nicaragua on the question of the validity or nullity of the treaty of limits of April 15, 1858, to be decided by The President of the United Status of America as Arbitrator*, 1887 (hereinafter "Reply of Costa Rica"), pp. 201-202. NR, Vol. II, Annex 6.

care for her natural reserves along the river by inspecting the cargo of passing boats in her own territory[159]. More will be said on this issue in Chapter IV below.

2.150. The foregoing examination of the Cleveland Award in light of the parties' submissions to the Arbitrator, as well as the practice of Nicaragua and Costa Rica under the 1858 Treaty and prior to the Cleveland Award, demonstrates beyond any doubt that Costa Rica's right to navigate on the San Juan with public vessels was limited to navigation by revenue boats "related to and connected with her enjoyment of the 'purposes of commerce'"[160].

B. THE MEANING OF "*CON OBJETOS DE COMERCIO*" WAS *NOT* DECIDED IN THE CLEVELAND AWARD

2.151. In the preceding paragraphs, Nicaragua discussed what the Cleveland Award decided. She will now turn to an issue that the Award did *not* decide. In particular, Nicaragua will demonstrate that President Cleveland's use of the English phrase "for purposes of commerce" in paragraph *Second* of his Award has no bearing on any of the issues in dispute in this case because he was not called upon to determine the meaning of that expression in any language.

2.152. In paragraph *Second*, President Cleveland found that Costa Rica "may navigate [the River San Juan] with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said

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[159] *See* CRM, Submissions, 2 (d), p. 147.

[160] Cleveland Award, *op. cit.* CRM, Vol. II, Annex 16, p. 98.

enjoyment."[161] Costa Rica seizes on the Arbitrator's use of the phrase "for purposes of commerce" and suggests that this means that he necessarily determined the meaning of the expression "*con objetos de comercio*" in Article VI of the Treaty of 1858. In her *Reply*, for example, Costa Rica states:

> "The parties agree that the case is primarily governed by the 1858 Treaty and the 1888 Cleveland Award, *that award confirming Costa Rica's right to sail vessels in the lower part of the San Juan 'for purposes of commerce'* and its right to sail public vessels in connexion with such navigation."[162]

2.153. This paragraph implies that President Cleveland *decided* that Costa Rica had a "right to sail vessels in the lower part of the San Juan 'for purposes of commerce'", and that he *decided* that the meaning of the phrase "*con objetos de comercio*" was "for purposes of commerce".

2.154. However, as demonstrated in Nicaragua's *Counter-Memorial*[163], President Cleveland could not have intended to decide anything about the meaning in English of the phrase "*con objetos de comercio*" because the issue was not before him. None of the "points of doubtful interpretation"[164] raised by Nicaragua related in any way to this expression.

2.155. In referring to Costa Rica's "enjoyment of the 'purposes of commerce'", President Cleveland simply adopted the English translation of the 1858 Treaty submitted by both parties (there was no material difference in this respect as between the two translations), being careful to place the expression "for purposes of commerce" within quotation marks. As Nicaragua has pointed out in her *Counter-Memorial*[165], this can only be understood as a reference back to the original Spanish text, which the arbitrator did not intend to alter by use of the English translation – and indeed could not have intended to alter because of his obligation to apply the Treaty. His use of the translation -- a translation which Nicaragua has shown to be incorrect[166] -- is, at most, *obiter dicta*. And even that is likely an overstatement under the circumstances.

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[161] *Ibid.*

[162] CRR, para. 2.08 (emphasis added).

[163] NCM, paras. 3.1.19-3.1.26.

[164] Letter from Fernando Guzmán to Costa Rican Foreign Minister, 22 June 1887. CRM, Vol. III, Annex 36.

2.156. In fact, there is no evidence that President Cleveland considered the original Spanish text of the Treaty at all in the process of preparing his award. This is confirmed by a Note of 31 October 1887 from United States Secretary of State T.F. Bayard to Nicaraguan Envoy and Minister Plenipotentiary Horacio Guzmán, from which Costa Rica quotes in her *Reply*, in which Secretary Bayard stresses that it is the English text of the Treaty "upon which the arbitrator must necessarily depend for his understanding of the issues before him"[167]. Assistant Secretary of State George L. Rives, to whom Cleveland delegated the task of preparing a draft of his arbitral award, did note certain phrases in Spanish in his first report that he considered to be most important for the purposes of the arbitration – none of which was "*con objetos de comercio*"[168]. In any event, had either President Cleveland or George Rives wished to refer to the original Spanish text, they had access to it; it had been provided by Costa Rica[169].

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[165] NCM, paras. 3.1.7 and 4.1.18.

[166] NCM, paras. 4.1.16-4.1.36; and Chap. III of this *Rejoinder*, below.

[167] Note from Secretary of State of the United Stats, T.F. Bayard, to Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, 31 October 1887. CRR, Vol. II, Annex 29, quoted in CRR para. 3.43.

[168] NCM, para. 3.1.25.

2.157. In an effort to give the Cleveland Award a legal effect it could not possibly have had, Costa Rica makes much of the fact that Nicaragua submitted to the Arbitrator only materials in English[170]. Yet, this fact only confirms that the parties were not asking the Arbitrator to interpret the original Spanish text. The two principal questions submitted to President Cleveland were whether the 1858 Treaty was valid and, if so, "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"[171]. These questions had nothing to do with interpreting the original text in Spanish. Nor did the eleven points of doubtful interpretation submitted to the Arbitrator by Nicaragua[172]. Thus, Costa Rica's preoccupation with Nicaragua's having submitted materials to the Arbitrator only in English ignores the questions that were actually submitted to the Arbitrator. In addition, it ignores considerations of courtesy and efficiency that must also have motivated both Nicaragua and Costa Rica; President Cleveland, after all, worked in English.

2.158. The conclusion is therefore clear. The mere appearance of the phrase "for purposes of commerce" in the Cleveland Award is irrelevant to the determination

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[169] *See* NR, originals filed with the Court Registrar. Informe sobre la cuestión de validez del tratado de límites de Costa Rica y Nicaragua y puntos accesorios sometidos al Arbitraje del Señor Presidente de los Estados Unidos de América. Presentado en nombre del Gobierno de Costa Rica por Pedro Pérez Zeledón. Washington, D.C. Gibson Bros., Printers and Bookbinders, 1887. pp. 171-177.

[170] CRR, para. 3.43.

[171] Román-Esquivel-Cruz Convention of Arbitration, 24 December 1886. NCM, Vol. II, Annex 11; *see also* Article 6, and CRM, Vol. II, Annex 14.

[172] *See* Letter from Fernando Guzmán to Costa Rican Foreign Minister, 22 June 1887. CRM, Vol. III, Annex 36.

of the true meaning of the Spanish expression "*con objetos de comercio*". That meaning is the subject of the following chapter of this *Rejoinder*.

C. CONCLUSION

2.159. This section has shown that: (1) Nicaragua and Costa Rica both accept that the applicable law is the 1858 Treaty as interpreted in the 1888 Cleveland Award; (2) paragraph *Second* of the Cleveland Award, particularly as elucidated by Costa Rica's arguments to the American President, make it clear that Costa Rica's right to navigate the San Juan River with public vessels is limited to navigation by vessels of the revenue service to the extent, and only to the extent, "related to and connected with" her navigation "*con objetos de comercio*"; and (3) contrary to Costa Rica's contention, the use by President Cleveland of the expression "for purposes of commerce" has no bearing on the present case because the meaning of the original Spanish expression "*con objetos de comercio*" as used in the 1858 Treaty was not in dispute in 1858 and was therefore not placed before the Arbitrator.

Conclusions

2.160. The evidence available leads to the inevitable conclusion that the primary object and purpose of the 1858 Treaty was the definitive settlement of the long-standing territorial dispute concerning the district of Nicoya (and the overall limits of Costa Rica and Nicaragua). The evidence of the specific object and purpose is as follows:

(i) **The historical context, including several bilateral treaties which form part of the historical context[173].**

(ii) **The nature of the title, and the text of the preamble.**

(iii) **The provisions of the Treaty, including the sequence of the provisions and the ranking of Article VI.**

(iv) **The diplomatic correspondence subsequent to the conclusion of the Treaty[174].**

(v) **The text of the Cleveland Award of 22 March 1888 and the Report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888[175].**

2.161. In her pleadings Costa Rica seeks to give a major role to the principles of general international law. The role of general international law, and related matters, have been examined in detail in Section II of the present Chapter. In the result it is clear that general international law, as presented in contemporary sources, does not help Costa Rica. In the first place it is supplanted by the 1858 Treaty which introduces a qualified right of "free navigation" in favour of Costa Rica. And, in addition, even if general international law were to apply, it would not recognise any right of navigation in her favour: the applicable principle would be the authority of the sovereign state (Nicaragua) over the waters of the San Juan.

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[173] *See also* NCM, paras 2.1.36-2.1.39.

[174] *See also* NCM, paras. 2.1-22-24.

[175] *See* NR, paras. 2.165 and 5.11-5.14

2.162. In Section II it is also demonstrated that, unless Costa Rica can positively show that other rules apply, there is no room for any further limitation upon Nicaragua's sovereignty apart from that resulting from Article VI of the Treaty. The attempts by Costa Rica to promote the application of other rules are shown to be failures.

2.163. The first such candidate rule concerns the so-called "related rights", and the relevant conjectures are rejected in Chapter IV below. The other candidates take the form of three bilateral instruments which have no legal relevance.

2.164. In her *Reply* Costa Rica insists on the relevance of the 1916 Judgment of the General American Court of Justice to the issues now before the Court. Not for the first time, Nicaragua must emphasise that this decision has no relevance whatsoever.

2.165. In the third section of the present chapter it has been shown that:

(a) contrary to Costa Rica's contention, the Cleveland Award did not grant her a right to navigation with her public vessels, or to carry out police or other security-related functions on the river; the question put by the parties to President Cleveland was whether Costa Rica had the right under the 1858 Treaty to navigate on the river with her vessels of war, or with vessels of her revenue service, or whether her navigation was limited to "transportation of merchandise;" the Arbitrator determined that Costa Rica had no right to navigate with vessels of war, but only with vessels of her revenue service when such navigation is related to, connected with or necessary for the protection of her right to navigate "for purposes of commerce". Chapter V of this *Rejoinder* addresses

the nature and extent of Costa Rica's right to navigate with vessels of her revenue service, as well as Costa Rica's alleged rights regarding protection, custody, and defence of the river; and

(b) contrary to Costa Rica's contention, the use by President Cleveland of the expression "for purposes of commerce" has no bearing on the present case because the meaning of the original Spanish expression "*con objetos de comercio*" as used in the 1858 Treaty was not in dispute in 1858 and was therefore not placed before the Arbitrator. Chapter III of this *Rejoinder* addresses the proper interpretation to be given to the expression "*con objetos de comercio*," and, accordingly, to the nature and extent of Costa Rica's right to navigate "*con objetos de comercio*" under the 1858 Treaty.

2.166. In her *Reply* Costa Rica is remarkably reluctant to recognise the force of the evidence, either in its separate manifestations, or as a whole. In this setting it has been necessary to reaffirm the character and main object and purpose of the Treaty of Limits, and to place its provisions within the appropriate legal perspective. As stated above in the Conclusions to Section I of this chapter, within the provisions of the Treaty and whatever the nature of Costa Rica's navigation rights thereunder, Nicaragua must have the exclusive competence to exercise the following regulatory powers.

(a) The protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation;

(b) **The protection of the border, including resort to immigration procedures in respect of foreign nationals entering Nicaraguan territory;**

(c) **The exercise of normal police powers;**

(d) **The protection of the environment and natural resources; and**

(e) **The maintenance of the Treaty provisions prescribing the conditions of navigation in accordance with the Treaty, that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award.**

CHAPTER III:

THE NATURE AND EXTENT OF COSTA RICA'S RIGHT TO NAVIGATE *"CON OBJETOS DE COMERCIO"*

Introduction

3.1. Nicaragua and Costa Rica agree that, under Article VI of the 1858 Treaty of Limits, Nicaragua has "exclusive dominion and supreme control (*sumo imperio*)" over the San Juan River, and that Costa Rica enjoys a "right of free navigation" on the River "*con objetos de comercio…*" There neither is nor can be a dispute over Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the River, and Costa Rica acknowledges this[176]. Nor is there a dispute that Costa Rica has a "right of free navigation" on a part of the river. There is disagreement, however, over the *nature* and *extent* of Costa Rica's right, and this disagreement is at the heart of the present case.

3.2. For Nicaragua, the Treaty of Limits conferred on Costa Rica, as an exception to Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the river, a "right of free navigation … *con objetos de comercio…*" Pursuant to this linguistic formulation, the "free navigation" to which Costa Rica enjoys a "right" is necessarily limited to navigation "*con objetos de comercio;*" that is Costa Rica's "right of free navigation" exists when her navigation is "*con objetos de comercio.*" And, therefore, navigation that is not "*con objetos de comercio*" is not a "right" afforded to Costa Rica by the Treaty.[177]

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[176] *See* CRR, para 2.69; *see also* Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-462-05, 28 Sept. 2005. CRM, Annexes, Vol. III, Annex 80.

3.3. Costa Rica, by contrast, reads the Treaty as though there were a full stop after the word "navigation." For her, the right of "free navigation" that she claims to enjoy is free-floating and unrestricted, and may be exercised without regard to the nature or purpose of the navigation. In particular, Costa Rica argues in these proceedings that her "right of free navigation" on the San Juan River is entirely separate from, and independent of, her right to navigate "*con objetos de comercio.*" In this chapter it will be shown that Costa Rica's argument is entirely without merit, and that she enjoys no navigational rights other than those related to navigation "*con objetos de comercio.*"

3.4. A second disagreement between the parties concerns the proper interpretation of "*con objetos de comercio.*" For Nicaragua, the word "*objetos*" means tangible "objects" or "articles" or "goods," such that the entire phrase is correctly translated as "with articles of trade." For Costa Rica, "*objetos*" means "purposes," and the phrase means "for purposes of commerce." As shown in the *Counter-Memorial*, and as will be further explained below, Nicaragua's understanding of "*objetos*" is the correct one: and the proper English translation of "*con objetos de comercio*" is "with articles of trade." However, and more to the point, in 1858 both parties' interpretations of the phrase "*con objetos de comercio*" -- that of Nicaragua and that of Costa Rica -- *had the identical meaning*. Whether the words of the Treaty are properly translated as "with articles of trade" or "for purposes of commerce," their meaning was the same, because -- as will be shown below -- in 1858 "commerce" necessarily meant "trade in goods." The idea that commerce also includes services -- such as tourism or passenger transit -- is a late-twentieth century invention far removed from the vocabulary or conceptual understanding of those who drafted the Treaty of Limits more than 100 years earlier. Thus, whichever party is right about the English translation of "*objetos*," the key word in the phrase is "*comercio*," and the entire phrase is properly understood as referring either to "articles of trade (in goods)" or to "purposes of trade (in goods)," which in the context of the 1858 Treaty mean the same thing: Costa Rica's "right of free navigation" exists whenever (but only whenever) her navigation involves trade in goods.

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[177] The "perpetual right of free navigation" does not include the right to be a party to any canal agreements that Nicaragua might enter into. This was made clear in the Cleveland Award, at paragraph 11. The "perpetuity" of Costa Rica's right is thus contingent on this eventuality. In the text, the use of the original language of the 1858 Treaty is maintained, subject to this reservation of Nicaragua's rights.

3.5. Costa Rica all but admits that *"con objetos de comercio"* meant trade in goods to mid-nineteenth century draftsmen, when she argues for an "evolutionary" interpretation of the phrase and invokes inter-temporal law to claim that, since we are now in the year 2008, the Court should supply a twenty-first century interpretation of "*comercio*," one which injects into that word (as a nineteenth century interpretation would not), the concept of services, including tourism and passenger transit. By this logic, Costa Rica would extend her "right of free navigation" beyond navigation involving trade in goods (as the right was understood by the parties in 1858) to a right to navigate in performance of commercial services, including sightseeing excursions. This is a third area of disagreement between the parties, and it, too, is addressed in this chapter, where it is shown that the 1858 Treaty cannot be given the evolutionary interpretation advocated by Costa Rica without: (i) ignoring its status as a Treaty of Limits; (ii) upsetting the delicate and carefully-balanced *quid pro quo* that the parties incorporated into the Treaty (regarding Nicaragua's acceptance of Costa Rica's annexation of Nicoya/Guanacaste in return for her exclusive sovereignty over the

San Juan River); and (iii) violating the intentions of the parties at the time the Treaty was negotiated and executed.

Section I. Interpretation of the 1858 Treaty of Limits According to the Vienna Convention on the Law of Treaties

A. THE LANGUAGE OF THE TREATY WITH RESPECT TO COSTA RICA'S NAVIGATION RIGHTS

3.6. The Vienna Convention on the Law of Treaties is helpful in resolving at least the first two of the disagreements identified in the Introduction to this chapter: the disputes over (i) whether Costa Rica's right of free navigation under Article VI of the Treaty of Limits refers specifically and exclusively to her navigation "*con objetos de comercio*," and (ii) whether navigation "*con objetos de comercio*" refers to trade in goods, or whether it can be extended to cover performance of services where no goods are involved.

3.7. Nicaragua and Costa Rica agree that the 1858 Treaty of Limits must be interpreted according to the principles established in Articles 31 and 32 of the Vienna Convention. Despite this agreement, they are at odds over the correct interpretation of the 1858 Treaty. In Nicaragua's submission, this is because Costa Rica pays lip service to the principles of the Vienna Convention, but then ignores them in conjuring an interpretation of the 1858 Treaty that departs from the plain meaning of the text, and contradicts the objects and purposes of the Treaty.

3.8. The dependence of Costa Rica's "right of free navigation" on her navigation "*con objetos de comercio*" is unmistakable, based on a good faith interpretation of the ordinary meaning of the language of the first sentence of

Article VI of the Treaty of Limits. In the English translation provided by Costa Rica, the "right of free navigation" refers directly to a particular kind of navigation: that which is conducted for the purposes of commerce ("*said* navigation" -- i.e., the free navigation that is the subject of the right -- "being for the purposes of commerce…"). The ordinary meaning of this text makes it plain that it is Costa Rica's right to navigation *"con objetos de comercio"* -- and no other -- that is deemed free under Article VI.

3.9. Contrary to this ordinary meaning, Costa Rica purports to find in the same language a right of free navigation dissociated from any substantive limit. To strengthen, even subliminally, the idea that the right of free navigation exists *per se*, autonomous and absolute, Costa Rica not only analyses such right in a separate section of her *Reply*, different from the one which is dedicated to navigation "*con objetos de comercio*"[178], but distinguishes in an explicit manner among the alleged breaches of Costa Rica's right of free navigation and the breaches of her right of navigation "for purposes of commerce"[179], and systematically, throughout its *Reply*, bombards the reader with allusions to the "right of free navigation" *tout court*[180].

3.10. Since the premises of Costa Rica's reasoning are erroneous, the consequences deduced from them must be rejected. Costa Rica's right of navigation over part of the San Juan River is not only situated within the framework of Nicaragua's "exclusive dominion and supreme control (*sumo*

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[178] CRR, Chap. 3.B. ("A perpetual Right of Free Navigation"), Chap. 3.C ("*con objetos de comercio*").

[179] CRR, Chap. 4.B (Breaches of Costa Rica's perpetual right of free navigation), Chap. 4.C (Breaches of Costa Rica's right of navigation "for purposes of commerce").

[180] In this sense, for instance, in CRR, paras. 1.27, 2.26, 2.27, 2.30, 2.33, 2.39, 2.40, 2.57, 2.68, 2.74 (6), 3.79, 3.97, 3.134, 3.148, 4.38, 4.42, 4.50, 4.69, 4.70, 4.71, 4.87, 5.05, 5.25, 5.28 y 5.29.

imperio)" -- over the waters, but is also limited substantively in its exercise by its linkage to articles of trade/purposes of commerce (*"con objetos de comercio"*)[181].

3.11. Thus, Costa Rica has no right of free navigation that is separate or independent from her navigation "*con objetos de comercio*." As the text of Article VI, given its ordinary meaning, makes clear, it is only Costa Rica's right to navigate *"con objetos de comercio"* that is free. No other navigation by Costa Rica enjoys this status under the ordinary meaning of Article VI.

3.12. Applying the same general rule of interpretation to the second disagreement between the parties -- over the meaning of *"con objetos de comercio"* -- the conclusion is inescapable that the language refers to trade in goods. If the word "*objeto*" in the singular may refer indistinctively to a matter, good or thing and, likewise, to a purpose, end or objective, depending on the context, the word normally does not include the latter concept when it is used in the plural form ("*objetos*"); and it definitely does not include the concept of "purpose" or "objective" when the plural form ("*objetos*") is qualified or linked with the word "*comercio*". The phrase "*con objetos de comercio*," therefore can only mean trade (or commerce) with articles, goods, or commodities; it can never mean "for purposes." This conclusion is supported by a leading expert on the Spanish language from the Spanish Royal Academy, the publisher of the official *Dictionary of the Spanish Language*. According to the Formal Opinion issued by Dr. Manuel Seco Reymundo, Member of the Royal Academy and Advisor to the Academy's Institute of Lexicography since 2000: "My conclusion, consequently, in view of all of the elements studied, is that, in the text of Article VI of the Treaty of Limits between Costa Rica and Nicaragua signed on 15 April 1858, the phrase '*con objetos de comercio*' must be understood as 'with things that are used in commercial activity.'"[182]

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[181] NCM, para. 4.1.8 ff.

3.13. Moreover, it is beyond dispute that, in 1858, the word "*comercio*" meant exclusively trade in goods (as opposed to services); at the time, "*con objetos de comercio*" could have only meant "with articles of trade." Even if Costa Rica's translation of the word "*objetos*" were accepted, the phrase "*con objetos de comercio*" would mean "for purposes of trade in goods." In the middle of the nineteenth century, the concept of "*comercio*" had not evolved to incorporate "services." It was exclusively concerned with "goods." Indeed the expansion of the original concept would take at least another one hundred years to evolve. This is demonstrated by contemporaneous dictionaries, and representative examples of contemporaneous usage, as well as expert opinion. These points will be further elaborated below, at paragraphs 3.71-3.89.

3.14. Costa Rica pretends to replace the interpretation of the only authentic text, which was drafted in Spanish, by an English translation made on the occasion of the Cleveland Arbitration, which Costa Rica considers more to her liking. Costa Rica even pretends that the meaning that she wishes to give to the expression "for purposes of commerce" was shared by Nicaragua.

3.15. The translations of the Treaty into the English language, which the parties provided to President Cleveland (and, in particular, the translation of "*con objetos de comercio*" as "for the purposes of commerce") did not imply an acceptance of any particular view on the scope of the right to free navigation; indeed it was not a point of disagreement between the parties, let alone one that was submitted to the decision of the Arbitrator, or one that he resolved. At the time of the Treaty, Costa Rica claimed no more than a right to navigate freely "*con objetos de comercio*," which Nicaragua accepted, and both understood that "*comercio*" -- in 1888 as well as in 1858 -- meant "trade in goods." Regardless of the proper English translation of the word "*objetos*," there could be only one meaning for the word "*comercio*," and that was trade in goods. Notably, the practice under the Treaty for the next one hundred years following the Cleveland Award confirms that the "*comercio*" referred to in the Treaty was trade in goods. When Costa Rica made a new interpretation, in the 1990s, and redefined "*comercio*" to include services as well as goods, she encountered an immediate answer by Nicaragua, which expressed the position that Costa Rica's right of navigation is with articles of trade, i.e. tangible goods, and does not include the performance of services, such as tourism or passenger transport[183].

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[182] Formal Opinion of Dr. Manuel Seco Reymundo (hereinafter "Seco Opinion"), 2 May 2008, para. 14. NR, Vol. II, Annex 64. (Original Spanish: "Mi conclusión, por consiguiente, a la vista de todos los datos estudiados, es que, en el texto del Artículo VI del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858, el sintagma *con objetos de comercio* debe entenderse 'con cosas sobre las que recae la actividad comercial'.")

3.16. As shown in the following section of this chapter, the historical context confirms the interpretation that Nicaragua has consistently given to Costa Rica's right of free navigation *"con objetos de comercio"* under the Treaty of Limits. The diplomatic documents and draft treaties preceding the 1858 Treaty demonstrate that the navigation rights under discussion were always for the purpose of allowing Costa Rica to carry on trade in merchandise, coffee in particular, half of whose production was exported to Great Britain, at a time when Costa Rica lacked any ports on the Caribbean Sea. In order to facilitate Costa Rica's exports to Europe, and avoid the hazardous, long and prohibitively expensive route around Cape Horn at the southern tip of South America, Costa

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[183] *See* Note from Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994. CRM, Annexes, Vol. III, Annex 48.

Rica repeatedly and urgently sought from Nicaragua the right to use the San Juan River as an outlet to the sea so that she could have a shorter and better route for her exports to Europe and other Atlantic destinations. Thus, the conduct of the parties both before and after the Treaty of Limits was executed consistently reflects their understanding that what was agreed to in the Treaty was a right of Costa Rican vessels to navigate on the San Juan River with articles of trade.

3.17. Nicaragua stated in her *Counter-Memorial* that: "Given that the application of the *General Rule* of interpretation offers a perfectly clear and reasonable meaning of the Article VI of the Cañas-Jerez Treaty, recourse to the *supplementary means of interpretation* mentioned by Article 32 of the Vienna Convention of Law of Treaties is not needed."[184] Nevertheless, as will be shown below, the historical record fully confirms the conclusions reached by Nicaragua through application of the General Rule of interpretation.

B. THE OBJECT AND PURPOSE OF COSTA RICA'S NAVIGATION RIGHTS UNDER THE TREATY

3.18. Nicaragua reiterates that, because the phrase *"con objetos de comercio"* in the Treaty of 1858 means "with articles of trade," recourse to supplementary means of interpretation is unnecessary. In the event the Court is nonetheless inclined to turn to supplementary principles of interpretation, as set forth in Article 32 of the Vienna Convention, those too confirm the reading Nicaragua advocates. In particular, the historical context of the 1858 Treaty makes clear that Costa Rica's navigation rights on the San Juan River are limited to navigation with articles of trade.

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[184] NCM, para. 4.1.34.

3.19. At paragraph 4.1.35 of her *Counter-Memorial*, Nicaragua observed that,

> "Costa Rica's other vital national aim was to secure for her products, mainly coffee, a way out to the Atlantic that would ensure faster and cheaper access to the European market, particularly Great Britain, which absorbed half her production at a time when Costa Rica lacked ports on the Caribbean and her exports to Europe had to head for Cape Horn. This … is what the Jerez-Cañas Treaty granted to Costa Rica."

In other words, the purpose Article VI of the 1858 Treaty, which gave Costa Rica the right to navigate the San Juan River *"con objetos de comercio,"* was to give that State an Atlantic (Caribbean) outlet for her trade with (and, in particular, her coffee exports to) Europe.

3.20. Costa Rica's *Reply* is conspicuously silent in response. Nowhere among its 231 pages does the *Reply* address, much less make any effort to refute, Nicaragua's characterisation of Costa Rica's needs and goals. And for good reason. As will be further demonstrated below, relying largely on Costa Rican sources – many contemporaneous with the Treaty of 1858 – Costa Rica's consuming preoccupation with the San Juan River in the middle of the 19th century was to gain access to it as a trade route to Europe. It is this key fact that defines the object and purpose of Costa Rica's navigation rights under Article VI of the Treaty of 1858.

1. *Costa Rica's Need for a Trade Route to the Atlantic*

3.21. In order to fully appreciate the historical context which led to Article VI, some observations about the development of Costa Rica's economy in the early 19th century are necessary. During the colonial period, Costa Rica was one of the poorest, most sparsely populated Spanish possessions in the Americas[185]. As stated in a 1953 study, "Costa Rica ended its history as a province of the great Spanish Empire in 1821 a poverty-stricken nation, almost wholly without roads and schools, without a printing press, without any governmental funds and without any foreign commerce save for the small exchanges made by overland routes with its neighbours, Panama and Nicaragua."[186]

3.22. At various moments during the colonial period, Costa Rica had made efforts to stimulate its languid economy by developing exportable surpluses of agricultural products. Both cacao (in the late 17th and 18th centuries) and tobacco (in the late 18th and early 19th centuries) were the subjects of early experiments, but both efforts met with only limited success[187]. Everything changed, however, with the coffee boom in the 1830s.

3.23. Coffee was initially introduced to Costa Rica in the late 18th and early 19th century[188]. Due to the unique suitability of the soil in Costa Rica's central plateau, coffee growing quickly took hold. By 1839, coffee had become the country's leading export; by 1843, it represented some 80% of Costa Rica's then burgeoning exports to the world market; and by 1853, it comprised a full 94% of total exports[189]. According to Costa Rican historian Paulino González Villalobos:

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[185] Jorge León Sáenz. *Evolution of the Foreign Trade and Maritime Transport of Costa Rica 1821-1900* (hereinafter "Evolution of the Foreign Trade"), San José, Editorial de la Universidad de Costa Rica, 1997, p. 11. NR, Vol. II, Annex 33.

[186] Richard J. Houk. "The Development of Foreign Trade and Communication in Costa Rica to the Construction of the First Railway" (hereinafter "Development of Foreign Trade"), (*The Americas*, Vol. 10, No. 2., 1953, Oct., pp. 197-209). NR, Vol. II, Annex 30.

[187] Evolution of the Foreign Trade, *op. cit.*, p. 44. NR, Vol. II, Annex 33.

[188] Development of Foreign Trade, *op. cit.*, p. 200. NR, Vol. II, Annex 30.

[189] Evolution of the Foreign Trade, *op. cit.*, p. 53. NR, Vol. II, Annex 33.

> "During the period of 1836-53, a series of qualitative changes took place within Costa Rican society that simultaneously increased the need for the road to Sarapiquí and generated contradictory processes. The determining element of these transformations was the dramatic development of coffee cultivation. This process had begun in 1832 with exportation to Chile. Years later, it would accelerate through direct trade with England and especially with the injection of financial capital from said nation.
>
> "The coffee boom forced a rapid process of change in land use within the Intermountain Central Valley. Subsistence farming and formerly hegemonic products (sugarcane, tobacco and wheat) were replaced by coffee, and their cultivation was marginalized to peripheral zones of the valley. In this way, a monoculture system was developed..."[190]

3.24. The importance of coffee to the growth of the Costa Rican economy and the Costa Rican nation cannot be overstated. The money she made exporting coffee to the world allowed Costa Rica to lift herself out of poverty and to transform quickly into one of the richer countries in the region. Writing in 1850, one of Costa Rica's leading citizens, Don Felipe Molina, captured the point succinctly: "Dedicated to farming and trade, [the Costa Rican people] live from the exportation of their fruits."[191]

(a) *The Inadequacy of Existing Trade Routes*

3.25. In the 1840s and 50s, Costa Rica relied principally on ports on her Pacific coast -- in particular, at Punta Arenas -- for the shipment of her coffee and other exports to the world. In another work dated 1851, Molina observed:

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[190] Paulino González Villalobos, *The Sarapiquí Route: A Socio-Political History of a Road* (hereinafter "Sarapiquí Route"), 1976, p. 34. NR, Vol. II, Annex 29.

[191] Felipe Molina, *Report on the Border Questions Raised Between the Republic of Costa Rica and the State of Nicaragua* (hereinafter "Molina Report"), 1850, p. 22. NR, Vol. II, Annex 35.

> "In the Pacific, the Republic of Costa Rica possesses many safe and spacious ports, such as: Golfo Dulce, Puerto Inglés, Las Mantas, Caldera, Punta Arenas, La Culebra, Santa Elena and Las Salinas. Among them, only Punta Arenas is currently frequented and has been outfitted for foreign trade, with the Free Port privileges granted by the legislature..."[192]

Statistics from the late 1840s show that more than 90% of Costa Rica's external trade was passing through Punta Arenas on the Pacific, while less than 10% passed through the Caribbean port at Matina:

> "From 1848 to 1849, the entry of ships to the Port of Punta Arenas increased in number to 70, with a total of 7,188 tons of imports. If we add a similar amount in exports and 1,200 tons for all trade from Matina [on the Caribbean], we would have the sum of 15,571 tons, representing mercantile movement as a whole."[193]

3.26. The existing Pacific route had serious disadvantages, however. During this period, most of Costa Rica's coffee was being exported to the United Kingdom, with lesser amounts to France and other European countries[194]. Yet, as stated in the *Counter-Memorial*, the shipment from Punta Arenas on Costa Rica's Pacific coast necessitated the arduous journey around Cape Horn at the tip of South America, a voyage which took at least five months and cost a staggering (at the time) five pounds per tonne[195]. An Atlantic outlet for Costa Rica's trade was the obvious solution. Yet, in contrast to the Pacific coast, Costa Rica's Atlantic coast offered few suitable sites. Writing again in 1851, Molina observed:

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[192] Felipe Molina, *Study of the Republic of Costa Rica* (hereinafter "Molina Study"), 1851, p. 36. NR, Vol. II, Annex 36.

[193] *Ibid.*, p. 32.

[194] *See Ibid.*, pp. 31-32.

[195] *See* Development of Foreign Trade, *op. cit.*, p. 202. NR, Vol. II, Annex 30.

> "On the Atlantic side, there is not a single site along the entire coast from San Juan, toward the southeast, to the cove of Veragua, that merits being called a good port, except for the magnificent bay of Boca Toro. Neither Matina nor Salt Creek (Moin) offer the necessary requisites, and this part of the seaboard is currently rarely frequented. Only a small amount of trade in sarsaparilla, tortoiseshell, coconut oil, etc. etc. is carried out from there."[196]

3.27. The lack of an Atlantic outlet was badly hampering the growth of the Costa Rican economy. According to Molina:

> "The growth of trade is paralyzed by the need to follow the long and laborious path of Cape Horn, as the several articles that it would be convenient to export cannot support the increased charter fees or heavy costs of such lengthy navigation."[197]

And:

> "Coffee, which is currently the primary export item, has been qualified as excellent, although it rarely reaches the marketplaces of Europe without having suffered deterioration due to the delays and setbacks experienced by shipments in the long and difficult trip that must be made around Cape Horn."[198]

3.28. These already serious problems were exacerbated in 1846 when the price of coffee on the world market dropped precipitously. As Costa Rica subsequently wrote in its Argument to President Cleveland in 1887:

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[196] Molina Study, *op. cit.*, p. 36-37. NR, Vol. II, Annex 36.

[197] *Ibid.*, p. 32.

[198] *Ibid.*, p. 30.

> "In 1846 Costa Rica had to pass through an exceptional crisis. Coffee, its principal export product, had experienced remarkable depreciation in the foreign markets, and could not stand competition, owing to the high freight that it had to pay when carried by the way of Cape Horn. It was of vital importance, and worthy of any sacrifice whatever, to have a passage open to the Northern Sea, that is, the Atlantic Ocean. The old port of Matina could not answer the purpose, owing to insuperable obstacles, and no recourse was left except making the exports through San Juan del Norte [at the mouth of the San Juan River]."[199]

(b) The Idea of the San Juan Route

3.29. Under the circumstances, the solution to Costa Rica's problem seemed to be to send her coffee and other products (grown largely in the central plateau) north to the San Juan River by way of one of that river's Costa Rican tributaries. Once on the San Juan, the coffee could be sent down the river, out to the Atlantic, and then on to Europe by way of the port of San Juan del Norte. In contrast to the five months required for the journey from Punta Arenas and around Cape Horn, the trip from San Juan del Norte to Europe took just forty days by sailing ship and half that by steamship[200]. The plan to make use of the San Juan River loomed large in the middle of the 19th century. According to Molina in 1851:

> "There is no doubt that San Juan [del Norte] is destined to be a market of first order, as well as the main point of departure for trade from Costa Rica by means of the Atlantic"[201].

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[199] Argument of Costa Rica, *op. cit.*, p. 47. NR, Vol. II, Annex 5 (emphasis added).

[200] *See* Development of Foreign Trade, *op. cit.*, p. 202. NR, Vol. II, Annex 30.

[201] Molina Study, *op. cit.*, p. 53: NR, Vol. II, Annex 36.

3.30. The idea of making use of the San Juan actually extended back several decades, at least to independence in 1821[202]. Several tributaries of the San Juan originating in Costa Rica offered possibilities, including both the San Carlos and Sarapiquí Rivers. From the beginning, however, the primary focus was on the Sarapiquí. On 12 March 1827, the Costa Rican government issued a decree offering land as a reward for discovering a route to the San Juan. Several individuals and companies accepted the challenge and began explorations for a route from San José to the Sarapiquí, but these early projects were abandoned for a variety of reasons, including a lack of man-power and capital, as well as the unexpectedly inhospitable terrain[203]. Contemporaneous records attest to the difficulties encountered. According to an account by the French Minister, Felix Belly:

> "From San Jose to this port was a journey of thirty-six miles, which had to be covered partly by mule and partly by rude canoes. M. Belly found the sole official was a captain of the port. He had neither a soldier nor a subaltern. He lived in a house without furniture, only half enclosed with canes, and he slept in the attic. This official estimated the weight of goods entering annually at one hundred tons. As it was not a customs port, he issued passes for goods, and the duties on them were paid upon their arrival in San Jose. The capital was reached only after

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[202] *See* Molina Report, *op. cit.*, p. 20. NR, Vol. II, Annex 35 (Spanish Original: "En tales circunstancias ocurrió que los habitantes de Costa-Rica, habiendo descubierto desde 1821 la posibilidad de abrir una comunicación pasta el puerto, por medio del río Sarapiquí, tributario del San Juan, emprendieron hacer, como en efecto hicieron, un camino hacia aquel rumbo, y comenzaron dirigir su comercio por aquel lado…") (English translation: "In such circumstances, it so occurred that the inhabitants of Costa Rica, having discovered since 1821 the possibility of opening communications to the port, by means of the Sarapiquí River, a tributary of the San Juan, undertook to build, and indeed did build, a road toward said course, and they began to direct their trade that side…").

[203] *See ibid.*, pp. 27, *et seq.*

> a long and arduous journey, for the road had to be opened with a machete"[204].

3.31. After the 1846 coffee crisis, and given Costa Rica's continued reliance on European markets for her coffee, the idea of improving the Sarapiquí route to the San Juan received renewed interest. Spurred on by coffee merchants, the Sarapiquí Company was created by decree dated 27 October 1851, and it was ordered to build a road between San José and the dock on the Sarapiquí in 18 months[205]. Again, the lack of labour proved to be a principal obstacle,[206] and the work was abandoned in 1853[207]. Even so, obtaining access to the San Juan as an outlet for her trade with Europe remained a high priority for Costa Rica.

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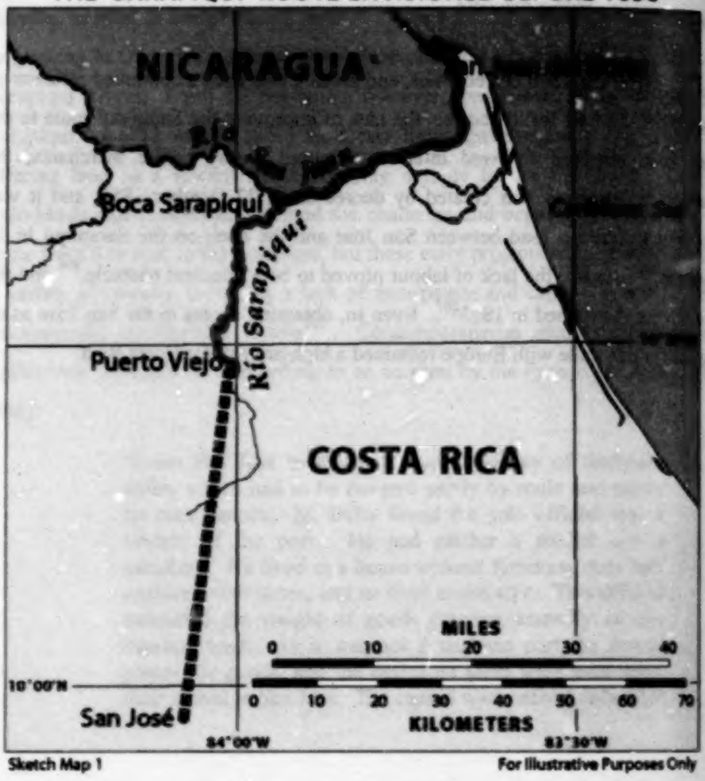
[204] Development of Foreign Trade, *op. cit.*, p. 202-03. NR, Vol. II, Annex 30. (In contrast to the 100 tonne figure cited, statistics show that in 1859, the volume Costa Rica's coffee exports alone totaled 5,000 tonnes.)

[205] *See ibid.*, p.67; *see also* Costa Rica, "Basis for the formation of a Company, named the Sarapiqui Company…," 27 October 1851, Art. 3. NR, Vol. II, Annex 49.

[206] *See* Sarapiqui Route, *op. cit.*, p. 70. NR, Vol. II, Annex 28.

[207] *See ibid.*, p. 71.

THE SARAPIQUÍ ROUTE ENVISIONED BEFORE 1858


NICARAGUA
Río San Juan
Boca Sarapiquí
Río Sarapiquí
Puerto Viejo
COSTA RICA
MILES
0
10
20
30
40
0
10
20
30
40
50
60
70
KILOMETERS
10°00'N
San José
84°00'W
83°30'W

Sketch Map 1

For Illustrative Purposes Only

(c) Negotiations with Nicaragua over the San Juan River prior to the 1858 Treaty

3.32. Because Nicaragua was sovereign over both the San Juan River and the port of San Juan del Norte at the river's mouth, Costa Rica's aspirations for a San

Juan route necessitated negotiations with Nicaragua. But those negotiations proved difficult. Nicaragua continued to object to Costa Rica's annexation of the Pacific coastal region of Nicaragua known alternatively as Nicoya or Guanacaste during the 1820s, and resisted Costa Rica's attempts to secure access to the San Juan for the trans-shipment of her trade.

3.33. The earliest negotiations on the subject took place in 1838, just as the Costa Rican coffee trade was exploding. The Costa Rican negotiator in these early talks was Don Francisco María Oreamuno. The confidential negotiating instructions he received make clear Costa Rica's driving interest in obtaining access to the San Juan River. According to Instruction No. 17, Oreamuno was to attempt to secure free navigation on the San Juan for all import and export items. The instructions state that in the event this proved impossible, Costa Rica would yield on the free *import* of foreign goods. In no case, however, would it compromise on the free *export* of her coffee:

> "[I]f necessary, this covenant shall include the prohibition of introducing foreign goods or merchandise to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs; and a fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, providing exports are done freely"[208].

Nothing came of these initial efforts to find a compromise.

3.34. With the 1846 coffee crisis, however Costa Rica's need for a low-cost Atlantic route became acute, and she renewed efforts to negotiate an agreement with Nicaragua. As recounted in her 1887 Argument to President Cleveland:

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[208] Instructions carried by the special Minister appointed to the Government of Nicaragua, 1838, para. 17. NR, Vol. II, Annex 7 (emphasis added).

> "Costa Rica decided to make an effort, and seek for a settlement, which, setting aside interminable discussions, would enable its Government to carry into effect the purpose above referred to [i.e., gaining access to the San Juan route to the Atlantic]. To this end it sent to Nicaragua Señores Madriz and Escalante, with such instructions as proper, to treat with her Government"[209].

This effort did yield a treaty signed by the parties' negotiators

> "related to navigation of the San Juan. This stipulated that the Costa Ricans were to pay, at the port of San Juan, warehouse fees, a tax over the tonnage of ships, and a transit duty of two silver reales (or five reales made of a copper and silver allow) for every "quintal" of fruits exported, along with four percent of the value of the merchandise imported"[210].

It was, however, subsequently rejected by Costa Rica, which was unwilling to pay the agreed charges. As Molina put it:

> "Such treaties must naturally have been ratified within an instant in Nicaragua, whereas in Costa Rica they were received with the indignation they deserved"[211].

3.35. Undeterred, Costa Rica continued to press ahead with her plans for a San Juan route, and in May 1848, she communicated to Nicaragua her intent to open a route to the San Juan via the Sarapiquí[212]. Nicaragua responded by threatening to break ties if Costa Rica pressed ahead without a prior agreement[213]. Molina was sent to discuss both the route and, more generally, the two States' territorial disputes, but again nothing came of these efforts[214]. Nicaragua insisted on retaining control of the river route while Costa Rica continued to press for an outlet for her trade to the Atlantic[215]. Throughout these discussions, Nicaragua (in addition to insisting on the return of Nicoya/Guanacaste) refused to recognize Costa Rica's right to navigate on the San Juan, and attempted to levy duties on the transport of Costa Rican goods[216].

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[209] Argument of Costa Rica, *op. cit.*, p. 47. NR, Vol. II, Annex 5.

[210] Molina Report, *op. cit.*, p. 30. NR, Vol. II, Annex 35.

[211] *Ibid.*, p. 31.

[212] *See* Sarapiquí Route, *op. cit.*, p. 59. NR, Vol. II, Annex 28.

[213] *See ibid.*, pp. 59-60.

3.36. In his 1850 recordings of these dealings, Molina made clear Costa Rica's rising frustration, made worse by what she perceived as the "vital need" for a San Juan route. He wrote:

> "Transit by the San Juan had become a vital need for the Costa Ricans, so the uncivil opposition intimated by Nicaragua was the same as condemning [Costa Rica] to a certain decline in her trade and wealth"[217].

As he saw it:

> "[Nicaraguan gave Costa Rica] this hard alternative: either renounce Guanacaste or renounce the Sarapiquí and the San Juan. These conditions are equally inadmissible because, on the one hand, in Guanacaste Costa Rica possesses a significant population, extensive farms and a growing number of cattle; whereas on the other hand, the mentioned rivers are the two main arteries for the country's circulation to the Atlantic"[218].

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[214] *See ibid.*, p. 60.

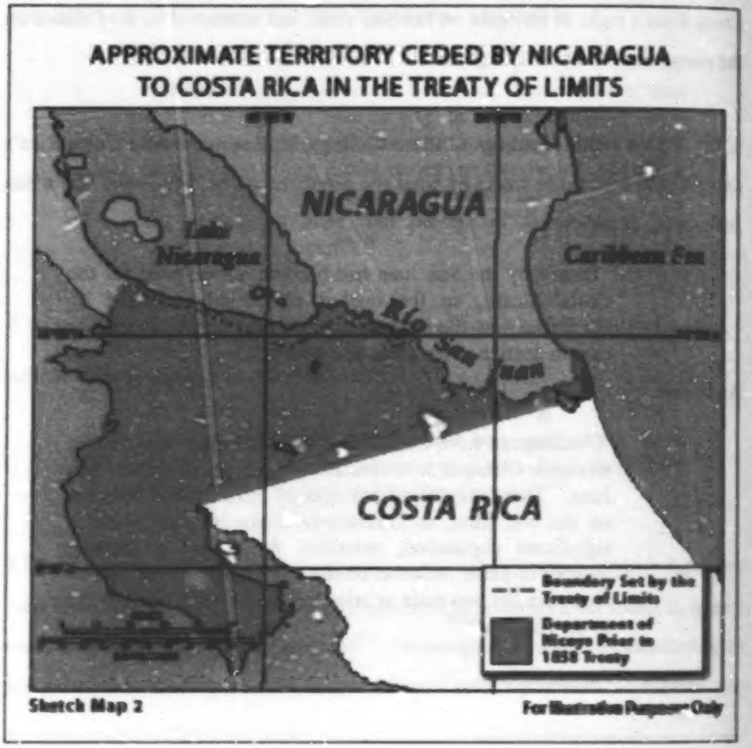
[215] *See ibid.*

[216] *See ibid.*, pp. 60-61.

[217] Molina Report, *op. cit.*, p. 32. NR, Vol. II, Annex 35.

[218] *Ibid.*, p. 36.

3.37. Nicaragua's claim to Guanacaste/Nicoya is shown in the map of Nicaragua published in 1855, which is reproduced following this page. The sketch map below compares the claim depicted on the 1855 map with the boundary that resulted from the 1858 Treaty of Limits.


APPROXIMATE TERRITORY CEDED BY NICARAGUA TO COSTA RICA IN THE TREATY OF LIMITS

NICARAGUA
Lake Nicaragua
Caribbean Sea
Río San Juan
COSTA RICA
Boundary Set by the Treaty of Limits
Department of Nicoya Prior to 1858 Treaty

Sketch Map 2

For Illustration Purposes Only

3.38. Costa Rica and Nicaragua resumed their efforts to negotiate a treaty in 1854. Meetings were held between diplomatic representatives of the two States between 10 January and 17 February 1854. "Protocols," or official minutes of the meetings were signed by the two heads of delegation. The Protocol of the meeting

NICARAGUA
LAKE
NICARAGUA

Map 1 [illegible]

held on 10 January 1854 states that the purpose of the discussion was to address "the issue of territorial limits pending between the two countries (*arreglar o transigir la cuestión de límites territoriales pendientes entre los dos países*)."[219]

3.39. Under discussion was the establishment of a boundary running parallel to, but several "leagues" south of, the San Juan River (leaving Nicaragua with the right bank of the river as well as the left) all the way to the Atlantic Ocean. Nicaragua's sovereignty over the San Juan would be subject, however, to the concession to Costa Rica, either in a formal Treaty of Limits or a Treaty of Friendship and Commerce, of "free transit by the river and port of 'San Juan,' for the import and export trade by the citizens of Costa Rica…(*el tráfico libre por el río y puerto de 'San Juan,' para el comercio de importación y exportación de los hijos de Costa Rica…*)."[220] As earlier, it was Costa Rica's objective in these negotiations to secure for herself the right to use the San Juan River as a route for her exports to the Atlantic and beyond.

3.40. To this same end, Costa Rica insisted in subsequent meetings and written communications that it should be "well understood that the waters of the river and port of 'San Juan' and of the Lake should be free at all times for the importation and exportation traffic of Costa Rica…(*bien entendido que las aguas del río y puerto de 'San Juan' y la del Lago deben ser libres en todo tiempo para el tráfico de importación y exportación de Costa Rica…*)[221]. Costa Rica's final proposal to

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[219] Protocol of the conference of 10 January 1854. NR, Vol. II, Annex 8.

[220] *Ibid.*

[221] Protocol of the conference of 9 February 1854. NR, Vol. II, Annex 9.

Nicaragua, communicated in a Memorandum dated 13 February 1854, insisted that: "The waters of the river and the Port of San Juan will be free to the importation and exportation traffic of Costa Rica, without at any time such trade being subject to any kind of taxation. (*Serán libres para el tráfico de importación y exportación de Costa Rica las aguas del río y Puerto de San Juan, sin que en tiempo alguno sea gravado el comercio con ninguna clase de impuesto*)."[222]

3.41. For various reasons indicated in the Protocols and the exchanges of correspondence between the parties, the negotiations failed and no treaty of limits was agreed. What is important for present purposes is the continuing centrality of Costa Rica's objective of obtaining from Nicaragua a guaranteed right to freely use the San Juan River and the port of San Juan del Norte as an outlet for her import and export trade.

3.42. Shortly after the failed treaty negotiations, civil unrest took hold in Nicaragua, creating an opportunity for the American filibusterer, William Walker, and his mercenaries to invade. In October 1855, they captured the capital of Granada and seized control of the country. Walker's history in Central America is notorious, as described in Nicaragua's *Counter-Memorial*[223]. It need not be revisited here. The important point is that when Walker attempted further conquests in Central America, a combined force of Nicaraguan, Costa Rican, Guatemalan, Salvadoran and Honduran soldiers dislodged him from power in May 1857.

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[222] Memorandum from Costa Rica, dated 13 February 1854, mentioned in the protocol of the conference of 17 February. NR, Vol. II, Annex 10.

[223] *See* NCM, paras. 1.2.35, *et seq.*

3.43. Upon conclusion of the hostilities with Walker's forces in May 1857, Costa Rica's army was the most powerful in Central America. Her forces occupied all strategic positions on both sides of the San Juan River. They were thus in a position to control all navigation on the river[224]. Costa Rica seized the moment to renew discussions over both Nicoya/Guanacaste and navigational rights on the San Juan. The negotiations resulted in the July 1857 Juárez-Cañas treaty in which Nicaragua expressly renounced her claim to Nicoya/Guanacaste[225]. The treaty recognised Nicaragua's domain over the San Juan River, although the fifth article provided that the

> "Republic of Costa Rica, as well as the one of Nicaragua, will have free use of the waters of the San Juan River, for navigation and transportation of articles of trade of import and export …"[226]

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[224] *See* "Message of the President of the Republic of Nicaragua, Juan Rafael Mora Porras, to the Congress, 6 September 1857", *Gazette of El Salvador*, Cojutepeque, 7 October 1857. NR, Vol. II, Annex 11. ("Great and infinite were the difficulties of all types that faced the Government, but all having been surpassed by a firm and decided will, I raised the voice of alarm yet again and was answered unanimously by all peoples. I ordered a column of brave men to march to the world of a general of known experience, to fight the enemy on the field of honor, as demonstrated gallantly in the area of Rivas. Convinced that our efforts and those of our allies would be made in vain unless we attacked the filibusterer at the source of his great resources and troops —that is, unless we stripped him of the forts and steamers with which he dominated the San Juan River and Lake Nicaragua, by means of which his men, arms and supplies would arrive every fifteen days on a scale much greater than ours and even greater than that of all Central America— I ordered the risky maneuver of surprising the enemy at these points.

…

God protected our objectives and our efforts, and within very few days the national flag fluttered over the forts on the river, at Punta de Castilla and on the beautiful Lake Nicaragua.")

[225] *See* Juarez – Cañas Treaty, 6 July 1857. CRM, Vol. II, Annex 5. ("First: The Government of Nicaragua, as a sign of gratitude for the Government of Costa Rica, for its good offices on behalf of the Republic, for the solid determination an great sacrifices made for the cause of national independence, waives, takes and puts away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the sovereign jurisdiction of said Government.")

[226] *Ibid.*

3.44. The 1857 Juarez-Cañas treaty was ultimately rejected by Costa Rica for reasons, and in circumstances, that are amply described in Nicaragua's *Counter-Memorial* (at paragraphs 1.2.41 through 1.2.47). It is sufficient here merely to reiterate that Costa Rica decided that it might be more advantageous to press her apparent military advantage and expand her territory at Nicaragua's expense, rather than accept a Treaty. Nevertheless, the 1857 treaty is a further manifestation of the constant in the historical record: Costa Rica's abiding interest in the San Juan River as a trade route, especially for her exports to Europe. The record shows that this was the driving force behind the right of navigation "*con objetos de comercio*" that parties enshrined in Article VI of the Treaty of 1858.

3.45. In her *Reply*, Costa Rica takes issue with Nicaragua's argument that the fifth article of the 1857 Juarez-Cañas treaty has any bearing on the interpretation of the phrase "*con objetos de comercio*" in Article VI of the Treaty of 1858. Costa Rica suggests -- albeit without actually arguing that this was the case here -- that "if one party fails to ratify a treaty, one may presume that it was dissatisfied and wanted a new text having a meaning *different* from that of the previous unratified one."[227] Costa Rica's intimation has no support in the record. Indeed, quite the contrary.

3.46. First, it should be noted that Nicaragua's argument is not merely that Article VI of the Treaty of 1858 should be read in light of the fifth article of the 1857 Juarez-Cañas Treaty. The point is much broader than that. As stated, the 1857 Juarez-Cañas treaty is but one further link in a long chain of evidence, consistent with the entire corpus of the historical record, demonstrating that Costa Rica's driving aspiration with respect to the San Juan was to secure access to it as a trade route for her goods. As such, it is not just the fifth article of the 1857 Juarez-Cañas Treaty, standing alone, that sheds light on the phrase "*con objetos de comercio*" in the Treaty of 1858, but rather it is the historical context taken as a whole, including the 1857 Treaty, that reveals the object and purpose of Article VI of the 1858 Treaty.

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[227] CRR, para. 2.54.

3.47. Moreover, even with respect to the narrow question of the interpretation of the 1857 treaty versus the Treaty of 1858, history shows that Costa Rica's bargaining position, especially with respect to the San Juan, had weakened considerably between the time of the unratified Juarez-Cañas Treaty in July 1857 and the Treaty of 1858 some nine months later. In the intervening time, Costa Rican soldiers had unexpectedly been dislodged from their positions on the Nicaraguan side of the San Juan. Costa Rica was thus no longer in *de facto* control of the river[228]. This fact was duly noted by a keenly interested William C. Jones, Special Agent of the United States to Nicaragua and Costa Rica, in a January 1858 report to Washington, where he observed that Nicaragua was now "in a better situation than before" in terms of her negotiation position vis-à-vis Costa Rica[229].

3.48. In addition, as discussed at paragraphs 1.2.41 through 1.2.46 of the *Counter-Memorial*, the United States had made her interests in the region abundantly clear during this period. She repeatedly informed Costa Rica that Washington would not countenance Costa Rica's bid for territorial aggrandizement at Nicaragua's expense. The United States likewise made plain her position that full sovereignty of the San Juan was to remain with Nicaragua, and Nicaragua alone. In his July 1857 instructions to Mr. Jones, the American Secretary of State, Lewis Cass, stated flatly: "[Y]ou will make known to the authorities of Costa Rica the confident expectation of the United States, that the possession of the territory, over which the line of communication passes [*i.e.*, the San Juan], will be left to Nicaragua."[230] Mr. Jones did as instructed and conveyed the message to Costa Rica. According to his 2 November 1857 letter to Secretary Cass:

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[228] *See* "Note from William Carey Jones, Special Agent of the United States of America to Central America, to Lewis Cass, Secretary of State of the United States," 30 January 1858, (*Diplomatic Correspondence of the United States: Inter-American Affairs 1831-1860*, edited by William R. Manning, Washington: Carnegie Endowment for International Peace, 1934, pp. 647-657). NR, Vol. II, Annex 13.

[229] *Ibid.*

> "[A]s early as June last the Government of Costa Rica refused to deliver the fortress of 'Castilla [sic] Viejo' and refused also to confirm a Treaty of limits with Nicaragua which gives to Costa Rica the free passage of the River San Juan for her importations & exportations quite as much as according to my instructions agrees with the views of the department. I have therefore not hesitated to make known to the authorities of this State and by such means as have been in my power to the Government of Costa Rica & to the authorities of the other States of Central America that it was the oppinion [sic] of the United States that the Jurisdiction of the entire Transit route ought to be sole & not divided and that that Jurisdiction ought to remain with the State (namely Nicaragua) to which it had previously belonged..."[231]

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[230] "Note from Lewis Cass, Secretary of State of the United State, to William Carey Jones, Special Agent of the United States to Central America," 30 July 1857. NCM, Annexes, Vol. II, Annex 21, p. 98.

[231] "Note from William Carey Jones, Special Agent of the United States of America to Central America, to Lewis Cass, Secretary of State of the United States," 2 November 1857, (*Diplomatic Correspondence of the United States: Inter-American Affairs 1831-1860*, edited by William R. Manning, Washington: Carnegie Endowment for International Peace, 1934, p. 624) (emphasis added). NR, Vol. II, Annex 12.

3.49. It is interesting to note, in the first of the two italicized phrases cited above, the recognition that the "free passage of the River San Juan" in the 1857 Treaty was for Costa Rica's "importations & exportations." Special Agent Jones delivered this pointed message -- including the U.S. position that Nicaragua was to have sole jurisdiction over the river -- to Costa Rica through the person of Costa Rican General José M. Cañas, the very same man who had negotiated the 1857 treaty on behalf of Costa Rica and who would subsequently negotiate the 1858 Treaty, as well[232].

2. *Article VI of the 1858 Treaty in Its Historical Context*

3.50. Consistent with the historical facts presented just above, the text of Article VI of the Treaty of 1858 makes clear that Costa Rica's navigational rights should, if anything, be interpreted more narrowly than the rights she would have enjoyed had she ratified the 1857 treaty, not more broadly as Costa Rica might like to suggest. For instance, the language of the 1857 Juarez-Cañas Treaty providing that the San Juan River constitutes Nicaraguan territory (article second) is worded rather generically, and states merely that the border between the two States shall be the southern bank of the San Juan River. In contrast, Article VI of the 1858 Treaty of Limits is notably more emphatic. It states: "Nicaragua shall have exclusive dominion and supreme control (*sumo imperio*) over the San Juan River."

3.51. Similarly, the Treaty of 1858 articulates Costa Rica's navigational rights in a very different way than the unratified 1857 treaty. In the 1857 Juarez-Cañas Treaty, Costa Rica's navigational rights not only receive stand-alone treatment in the fifth article thereof, they are presented as co-equal to Nicaragua's rights ("The Republic of Costa Rica, as well as the one of Nicaragua, will have free use ..." *etc.*). Article VI of the Treaty of 1858, on the other hand, is worded so as to make Costa Rica's navigational rights an express and limited exception to Nicaragua's otherwise unqualified sovereignty: "Nicaragua shall have exclusive dominion and supreme control (*sumo imperio*) of the waters of the San Juan River *but* the Republic of Costa Rica shall have perpetual rights of free navigation ... [*con objetos de comercio.*]" These, of course, are very different linguistic formulations and compel a narrower interpretation of Costa Rica's rights under the Treaty of 1858 than under the 1857 Treaty. It therefore cannot be true that Costa Rica acquired broader navigational rights under the Treaty of 1858 than she did under the 1857 Treaty. Under both treaties, Costa Rica's rights extend no further than navigation with articles of trade.

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[232] *See ibid.*

3.52. The language of Article VI further confirms that the parties' purpose in giving Costa Rica the right to navigate the San Juan *"con objetos de comercio"* was to afford her the Atlantic trade outlet she had long sought. Article VI states, for example, that Costa Rica shall have the right to navigate the San Juan "*con objetos de comercio*" either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica."[233] Given the historical antecedents discussed above, these specific references to the Sarapiquí and San Carlos rivers are telling. They are obvious manifestations of Costa Rica's long-standing interest in making use of these watercourses as trade routes. As such, they constitute unmistakable connections between the specific text of Article VI and the historical context. Costa Rica's objective, which became an object and purpose of Article VI, was to secure a way, whether by the Sarapiquí, the San Carlos or some other tributary of the San Juan, to get her coffee -- her dominant article of trade -- to the European market as expeditiously as possible.

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[233] "Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 April 1858," Article VI. CRM, Annexes, Vol. II, Annex 7(b), p. 50. As will be discussed later in the text, this translation, taken from Costa Rica's *Application* is not precisely correct in several important respects.

3. *Early Practice of the Parties under the Treaty of 1858*

(a) The Fate of the Sarapiquí/ San Juan Trade Route

3.53. It is ironic that soon after the Treaty of 1858 had been concluded and Costa Rica achieved her longstanding objective of gaining access to the San Juan to transport her exports to European markets, her interest in the San Juan diminished sharply. Indeed, as a trade route, the San Juan became all but irrelevant to Costa Rica -- within just two years of the Treaty's execution. Several causes were at play. The first was the completion of the trans-isthmian railroad across Panama in 1855. By 1860, Costa Rican merchants were shipping their goods via the Pacific to Panama, and relying on the railroad to get the goods to the Atlantic. As a consequence, they had less interest in using the more difficult land route to the Sarapiquí River and then to the San Juan[234]. Reflecting the decreased importance of the Sarapiquí/San Juan route, Costa Rica's customs post on the Sarapiquí was closed in July 1860[235].

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[234] *See* Sarapiquí Route, *op. cit.*, p. 73. NR, Vol. II, Annex 28.

[235] *See* Decree closing Moín and Sarapiquí Ports, Costa Rica, 24 July 1860, Art. 2. NR, Vol. II, Annex 50 (Original Spanish: "Quedan suprimidas las Aduanas de ambos puntos [Puertos de Moín y Río Sarapiquí]").

3.54. A second reason diminishing the importance of the formerly "vital need" for an Atlantic outlet *via* the San Juan was the construction of a railroad across Costa Rica herself, from San José to Limón on Costa Rica's Atlantic coast. The project, on which construction began in 1871 and concluded in 1890[236], gave Costa Rica a wholly domestic solution to her problem that involved neither shipment to a foreign country (Panama), nor reliance on a neighbour with whom relations were not always smooth (Nicaragua).

3.55. The Costa Rican railroad was built in stages and actually began service from the coffee-producing Central Valley to Limón on the Atlantic coast in 1882, some eight years before completion of the entire route[237]. In these early years, goods were transported in stages, alternatively by road from San José to Carrillo, and then by rail from Carrillo to Limón on the Atlantic[238]. Once the railroad came into use in the early 1880s, the importance of the port of Punta Arenas on the Pacific diminished, as Costa Rica at long last had her prized outlet to the Atlantic for her trade[239]. By 1886, just five years after the railroad came into operation, and still four years before the entire line was completed, Limón had surpassed Punta Arenas in importance, and by 1907 fully 90% of Costa Rica's foreign trade was passing through the port of Limón[240].

3.56. Yet another factor contributing to Costa Rica's abandonment of the San Juan as a trade route was the substantial change in the geography at the mouth of the river. As early as the 1860s, the diversion of much of the flow of the San Juan into the Colorado River drastically reduced the volume of water flowing to the lower reaches of the San Juan, rendering the river substantially less navigable than it had been previously[241]. The silt carried down the San Juan also altered the geography at the mouth of river in the vicinity of the port of San Juan del Norte to such an extent that the river became all but inaccessible from the sea, except only for the smallest boats[242].

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[236] *See* Evolution of the Foreign Trade, *op. cit.*, p. 167. NR, Vol. II, Annex 33.

[237] *See ibid.*

[238] *See* J. A. Rodriguez Bolaños & V. G. Borge Carvajal, *The Railroad to the Atlantic in Costa Rica*, 1979, p. 6. NR, Vol. II, Annex 38.

[239] *See ibid.*, p. 251.

[240] *See* Evolution of the Foreign Trade, *op. cit.*, Table 6-2, p. 170. NR, Vol. II, Annex 33.

3.57. As a result of all three developments -- the completion of the Panama railroad, the construction of the Costa Rican railroad, and the changes to the geography of the San Juan -- the Sarapiqui/San Juan route was all but abandoned as an outlet for Costa Rica's foreign trade. Costa Rican merchants stopped using the San Juan to transport their goods to the Atlantic coast and beyond. It is precisely these facts that account for the dearth of information supplied by Costa Rica concerning her pertinent practices between 1858 and the 1990s. The Applicant State's pleadings are remarkable for the scant information provided about her use of the river during this 130-year period.

3.58. In this respect, it is conspicuous that Costa Rica nowhere alleges, much less provides any evidence, that she actually made use of the San Juan for any trade-related purposes. For the 130 years subsequent to the Treaty of 1858, Costa Rica provides nothing because there was nothing. Put simply, there was no practice of navigating "*con objetos de comercio*" because Costa Rica was not using the San Juan as a trade route. It was only when tourism was initiated -- in the early 1990s-- that Costa Rica actually attempted to exploit the San Juan River.

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[241] *See* David I. Folkman Jr., *The Nicaragua Route*, 1976, pp. 115-6. NR, Vol. II, Annex 28.

[242] *See ibid.*

This use of the river will be discussed below in greater detail, in Chapter IV, Section II.

(b) The Two Treaties of 1868

3.59 Although, for the reasons discussed, Costa Rica lost her interest in the San Juan as a trade route in the years subsequent to the Treaty of 1858, there is at least one occasion on which the parties returned to the issue. They did so in a way that confirms yet again the extent to which the object and purpose of Costa Rica's navigation right on the San Juan River under Article VI of the Treaty was to afford her an outlet for her trade in goods.

3.60. In particular, in July 1868, several years before construction of the Costa Rican railroad began, Nicaragua and Costa Rica entered into a preliminary treaty concerning the improvement of either (a) the port of San Juan del Norte in Nicaragua, or (b) Boca del Colorado at the mouth of the Colorado River in Costa Rica. As discussed, the diversion of the flow of the San Juan into the Colorado rendered the lower reaches of the San Juan largely impassable to merchant traffic, and the mouth of the river inaccessible to the sea. Given this, Costa Rica and Nicaragua agreed to conduct a joint investigation to determine which of San Juan del Norte or Boca del Colorado was a better port site, and to conduct improvements at the chosen location.

3.61. Pursuant to the 1868 treaty, Costa Rica and Nicaragua carried out the stated site investigation and jointly concluded that the better site was San Juan del Norte. Subsequently, they adopted a follow-on convention dated 21 December 1868 which, read as a whole, confirmed that whatever interest Costa Rica had in the San Juan was as an outlet for her foreign trade. The treaty is worth citing *in extenso* so that Court may appreciate the point for itself:

> "Article II
>
> The Government of Nicaragua, on its part, commits to stipulate, in the event that any transit contract is entered into, whether with nationals or foreigners, that the freight rates established by Nicaragua for imported or exported products or merchandise shall also extend to Costa Rica, and any grace, privilege or cohesion obtained by Nicaragua, as far as transportation on the San Juan River is concerned, shall extend to Costa Rica on an equal footing.
>
> Article III
>
> Vessels from Costa Rica, which arrive at the San Juan del Norte port, shall not pay any duties which are not charged to the national vessels of Nicaragua.
>
> Article IV
>
> In the event that San Juan ceases to be a free port, and the Government of Nicaragua subjects to registration or taxation the merchandise which is imported or the products which are exported through it, the merchandise and products imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties.
>
> Article V
>
> If in the previous case, it were to occur that the Government of Nicaragua, as a result of any internal disorder or because it finds itself at war, could not efficiently protect the San Juan port, the Government of Costa Rica is granted the right to send the necessary force to the aforesaid port to protect the [interests of comercio] of Costa Rica, and the Government of Nicaragua shall not concur in the cost of this provision."[243]

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[243] "Convention Between Nicaragua and Costa Rica, Supplemental to the Convention of July 13th of this Year, Related to the Improvement of the Colorado or San Juan Rivers (Rivas-Esquivel)", 21 December 1858. NR, Vol. II, Annex 1.

3.62. As the Court will appreciate, the treaty makes clear that, as far as the San Juan River and port of San Juan del Norte were concerned, Costa Rica's "interests of commerce'" were defined just as her navigation *"con objetos de comercio"* had been defined in the 1858 Treaty; that is, by her "merchandise which is imported or the products which are exported". Thus, Article 2 is designed to ensure that Costa Rica pays no greater tariffs on imports and exports shipped on the San Juan than Nicaragua herself. Similarly, Article 4 guarantees that Costa Rican imports and exports at the port of San Juan del Norte will remain free regardless of whether or not the port as a whole remains a free port. Indeed, Article 5 even gives Costa Rica the right to send her military to the port of San Juan del Norte to protect her "interests of '*comercio*'" in the event that Nicaragua is unable to do so. There can be no dispute that in 1868, as in 1858, Costa Rica continued to view the San Juan as an outlet, albeit a less important one, for her "*comercio*," meaning her import and export of goods.

(c) Costa Rica's Written Submissions to President Cleveland

3.63. Notably, Costa Rica herself admitted that her navigation rights on the San Juan were limited to the transportation of trade goods in her briefs to President Cleveland in 1887. The admission appears in the portion of Costa Rica's opening submission to the American President that addresses the question of whether or not Costa Rica had the right to navigate on the San Juan with vessels of war. At the beginning of her argument, Costa Rica first quotes the relevant passages of Article VI of the Treaty of 1858 giving her the right of navigation *"con objetos de comercio."* She then proceeds to pose the revealing rhetorical question:

> "Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or

> **simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?"[244]**

3.64. Thereupon, Costa Rica naturally proceeds to argue that the answer to her own rhetorical question must be "no" (a conclusion with which President Cleveland very much did *not* agree). What is telling for present purposes, however, is that Costa Rica expressly equated her navigational rights *"con objetos de comercio"* under Article VI of the Treaty of 1858 to the "transportation of merchandise."

(d) The Alexander Award of 1897

3.65. The arbitral award of 30 September 1897, issued by General E.P. Alexander, confirmed that the Treaty of 1858 gave Costa Rica the right of free navigation on the San Juan River "*con objetos de comercio*" so that she would have an Atlantic outlet for her import and export of goods. In fact, Award No. 1 by General Alexander is decisive on this issue. The Court will recall that by treaty dated 27 May 1896 Costa Rica and Nicaragua agreed to submit to an arbitrator (to be chosen by the President of the United States) any disputes that might arise in the work of the boundary commissions from both States then tasked with defining precisely the location of the boundary between them[245].

3.66. The first question presented to General Alexander concerned the starting point of the boundary at the mouth of the San Juan River. After receiving extensive argumentation from the parties, he issued his ruling. Although Nicaragua quoted the decision in paragraph 2.1.44 of her *Counter-Memorial*, the Arbitrator's words are worth revisiting here for reasons that will immediately be obvious to the Court. He stated:

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[244] Argument of Costa Rica, *op. cit.*, p. 155. NR, Vol. II, Annex 5 (emphasis added).

[245] *See* NCM, para. 1.3.38; NCM, fn. 296.

> "[O]f these considerations the principal, and the controlling one, is that we are to interpret and give effect to the treaty of April 15, 1858, in the way in which it was mutually understood at the time, by its makers. … It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences. And this meaning of the men seems to me abundantly plain and obvious.
>
> (…)
>
> [F]rom the general consideration of the treaty as a whole, the scheme of compromise stands out clear and simple.
>
> Costa Rica was to have as a boundary line the right, or southeast, bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea."
>
> Nicaragua was to have her prized sumo imperio [emphasis in original] of all the waters of this same outlet for commerce, also unbroken to the sea."[246]

3.67. As indicated in the first paragraph of the quoted text, General Alexander's understanding of the parties' intent very much informed his decision as to the boundary's starting point. The difficulty identifying this point had arisen because the San Juan spread out into a delta comprised of three different branches before reaching the sea. The arbitrator ultimately rejected a boundary following one of the two other branches precisely because neither was a viable trade outlet. He stated: "[The boundary] cannot follow either of them, *for neither is an outlet for*

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[246] "First Award rendered by the umpire, EP Alexander, San Juan el Norte on September 30, 1897, in the boundary question, between Costa Rica and Nicaragua". CRM, Annexes, Vol. II, Annex 18, p. 107 (emphasis added).

commerce, as neither has a harbor at its mouth. It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea."[247] For General Alexander, the boundary between Nicaragua and Costa Rica could only be the branch of the river that "is an outlet for commerce" with "a harbor at its mouth," because only that boundary fulfilled the purpose of Article VI of the 1858 Treaty, which was to provide Costa Rica with "an outlet for commerce."

3.68. General Alexander similarly resolved a dispute concerning title to an island located near the mouth of the San Juan by reference to the object and purpose of Article VI. The precise question concerned an island that would have been connected to Costa Rica by a sand bar at the time of year the Treaty of 1858 was signed, which was at the end of the dry season. The arbitrator found that the presence of the sand bar during the dry season did not alter the course of the boundary along Costa's Rica's right bank, stating: "[I]t would be unreasonable to suppose that such temporary connection could operate to change permanently the geographic character and political ownership of the island. The same principle, if allowed, would give to Costa Rica every island in the river to which sand bars from her shore had made out during the dry season. But *throughout the treaty, the river is treated and regarded as an outlet for commerce*. This implies that it is to be considered as in average condition of water, in which condition, alone, it is navigable."[248]

* * *

3.69. For all these reasons, it is clear that the intent of Nicaragua and Costa Rica in 1858 was to afford Costa Rica the Atlantic outlet for her exports and imports that she long desired. It is equally clear, however, that the need for this outlet had all but evaporated soon after the ink had dried on the Treaty of Limits. Due to the construction of railroads across Central America in both Panama and later Costa Rica herself, as well as to morphological changes in the lower San Juan area, the San Juan route became unimportant to Costa Rica, and so it remained -- until the last decade of the 20th century, when the Costa Rican tourist boats first undertook regular voyages to the river, as further elaborated in Chapter IV.

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[247] *Ibid.* (emphasis added).

[248] *Ibid.*, p. 108 (emphasis added).

4. "Comercio" as Understood in 1858 Meant Trade in Goods

3.70. That the parties intended Costa Rica to have the right to use the San Juan as a trade route for her goods is still further confirmed by the fact that, as stated at paragraph 4.3.19 of the *Counter-Memorial*, the term "*comercio*" as understood in 1858 embraced only the traffic in commodities. It did not include broader notions which today may be included within the meaning of the term "commerce." Thus, the right the parties to the 1858 Treaty gave to Costa Rica to navigate the San Juan River *"con objetos de comercio"* was a right to use the river as a route for her export and import of goods. In her *Reply* Costa Rica contends simply that Nicaragua's position is unjustified[249]. Yet, as will be shown below, Nicaragua's position is amply supported by multiple sources, many of them Costa Rican. Contemporaneous dictionaries, contemporaneous histories prepared by Costa Rican officials, the pleadings of Costa Rica before President Cleveland and official translations of other period treaties all show that "*comercio*," as understood by the parties in 1858, encompassed only trade in goods; in the mid-nineteenth century, the term did not extend to services.

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[249] *See* CRR, para. 3.74.

(a) Contemporaneous Dictionary Definitions

3.71. Perhaps the best starting place for ascertaining the scope of the term "*comercio*" in 1858 is with the edition of the *Dictionary of the Spanish Royal Academy* current to the Treaty of 1858. In the 1852 edition, the primary definition of "*comercio*" is given as follows: "Business and trafficking that is done by buying, selling or exchanging some things for others (*Negociación y tráfico que se hace comprando, vendiendo ó permutando unas cosas con otras*)."[250] The term thus plainly embraced the exchange of physical objects.

3.72. Although the English translation that perhaps most naturally springs to mind for "*comercio*" is "commerce," in fact (and consistent with the above definition from the Spanish Royal Academy), it can be and was equally translated as "trade." Period dictionaries confirm the point. Indeed, it is interesting to note that the primary translation listed for "*comercio*" is typically "trade," with "commerce" appearing only secondarily. The Spanish translation for the English "trade" is "*comercio*."[251] In the 1858 edition of *A Dictionary of the Spanish and*

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[250] Royal Spanish Academy, *Dictionary of the Castilian Language*, Tenth edition, 1852. NR, Vol. II, Annex 59. [Excerpt: "The grammatical evidence is impressive. The first meaning of *commerce* given by the dictionary of the Spanish Royal Academy of 1803 is: 'Negotiation and traffic which is made buying, selling, or exchanging some things for other'. The same meaning is repeated in the editions of 1817, 1822, 1832, 1837, 1843, 1852, applicable at the date of signature of the Cañas-Jerez Treaty, and then, in the editions of 1869, 1884, 1899 and successive editions until today where the word *commerce* continues to be, in the first place, 'Negotiation which is made by buying or selling or exchanging genres or merchandises.' (Foonotes omitted).]

[251] *The New Pocket Dictionary, of the Spanish and English Languages*, 1809. NR, Vol. II, Annex 58.

English Languages, "*comercio*" is translated as "[t]rade, commerce," and "trade" is translated as "*comercio*."[252]

(b) *Contemporaneous Usages*

3.73. The fact that the term "*comercio*" as used and understood in the middle of the 19th century embraced the traffic in goods, and was translatable into English as "trade," is amply confirmed by numerous Costa Rican sources from the time. For example, the contemporaneous translation of Felipe Molina's 1850 work "Memoir on the Boundary Question Pending Between the Republic of Costa Rica and the State of Nicaragua" contains an English translation of the February 1796 royal decree first establishing the port of San Juan del Norte, about which so much has been written:

> "His Majesty, being desirous that the province of Nicaragua and the other provinces of the kingdom of Guatemala, which are situated more than three hundred leagues distance from the capital, and from the ports of Omoa and Santo Tomas de Castilla, may be enabled to carry on a direct trade ("comercio") with the mother country, without being subject to the inconveniences of a long distance, has been pleased to declare that the harbor of San Juan de Nicaragua, on the river of the same name, shall be a port of the second class"[253].

3.74. Similarly, in 1851, Costa Rica and the United States of America entered a Treaty of Friendship, Commerce and Navigation. Although the term "*comercio*" appears throughout the treaty in Spanish, it appears variously in the English language version as either "commerce" or "trade."[254] To exactly the same effect is the Treaty of Friendship, Commerce and Navigation between Costa Rica and the United Kingdom ratified in 1850. It is interesting to note further that the subject of these treaties of "commerce"/"*comercio*" was very much the reciprocal trade in goods – underscoring the effective equivalence among "*comercio*", "trade" and "commerce" in the mid-19th century lexicon.

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[252] Mariano Velázquez de la Cadena, *A Dictionary of the Spanish and English Languages*, 1858, pp.106 and 805. NR, Vol. II, Annex 60.

[253] Felipe Molina, *Memoir on the Boundary Question Pending Between the Republic of Costa Rica and the State of Nicaragua*, 1851, pp. 5-6. NR, Vol. II, Annex 37 (emphasis added).

3.75. Once again, the work of Molina is particularly helpful. In his 1851 "Study of the Republic of Costa Rica", he devotes a section to the "*comercio*" of Costa Rica. It begins:

> "This is carried out mainly with England, on English ships. Almost all products from the country end up in the United Kingdom, in exchange for English manufactured goods, which to date make up the greatest part of consumption. Nevertheless, there is a French firm that receives three or four expeditions each year, and the French goods are highly esteemed."[255]

3.76. Molina goes on to discuss points already highlighted in the preceding section of this chapter; namely (1) that the growth of Costa Rica's *"comercio"* is paralyzed by the need to travel around Cape Horn, and (2) that the majority of Costa Rica's *"comercio"* was entering and exiting through Punta Arenas on the Pacific coast. It is thus clear that *"comercio"* as understood at the time meant trade in goods.

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[254] "Treaty of Friendship, Commerce, and Navigation, between the United States of America and the Republic of Costa Rica," 10 July 1851. CRR, Annexes, Vol. II, Annex 9.

[255] Molina Study, *op. cit.*, pp. 31-32. NR, Vol. II, Annex 36.

3.77. Additional confirmation of this fact can be found in the provisions of the August 1868 Treaty of "*comercio*" between Nicaragua and Costa Rica[256]. As its title indicates, this brief treaty deals entirely with the subject of "*comercio*" between the two States, and is thus of interest for reasons that are obvious. The terms of the treaty make clear that "*comercio*" meant trade in goods. This shines through in the very first sentence of Article I which states: "There shall be between the Republics of Costa Rica and Nicaragua a reciprocal freedom of *comercio* in all the goods that are not prohibited by their respective laws. (*Habrá entre las Repúblicas de Costa Rica y Nicaragua una recíproca libertad de comercio con todos los artículos no prohibidos por sus respectivas leyes*)." By itself, and without more, this one line shows in the clearest possible way that "*comercio*" was something one did with goods.

3.78. The remaining provisions of the 1868 Treaty of "*comercio*" are consistent, and likewise make clear that "*comercio*" meant trade in goods. Although Nicaragua invites the Court to read the treaty in its entirety, just one other quotation should suffice to prove the point. Article 2 states:

> "[I]t is therefore declared and established, regarding their particular and own products: that the imports and exports that are made from one point to the other, either by sea of land, of the goods or natural or industrial products natural to the sender's country shall not pay rights or taxes of any kind…"[257]

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[256] "Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San José," 14 August 1868. CRM, Annexes, Vol. II, Annex 10, p. 73.

[257] *Ibid.* (Original Spanish: "[S]e declara y establece, respecto de sus particulares y propias producciones; que las importaciones y exportaciones que se hagan de uno á otro punto, ya sea por mar ó por tierra, de los artículos ó productos naturales ó industriales, propios del país que los remite, no pagarán derechos ni impuesto de ninguna clase.")

Although Nicaragua hesitates to belabour the obvious, this provision again makes abundantly clear that the *"comercio"* that was the subject of the treaty was the traffic in "imports and exports" of "natural or industrial articles or products"; that is, trade in goods.

(c) The Full Text of Article VI Makes Clear That "Comercio" *Means Trade in Goods*

3.79. Based on the contemporaneous understanding and read in proper context, it is clear that the term *"comercio"* as used in Article VI of the Treaty of 1858 meant trade in goods, and trade in goods only. Although the text of Article VI has now been cited many times by both parties, it is worth reviewing again with this point in mind. In pertinent part, it states:

> "... the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth [of the San Juan River]and the point, three English miles distant from Castillo Viejo, ["con objetos de comercio"] either with Nicaragua or with the interior of Costa Rica ..."

Although Costa Rica has focused extensively on the phrase *"con objetos de comercio,"* she has given no attention to the language immediately following, which states that the *"comercio"* will either be "with Nicaragua or with the interior of Costa Rica". The limitation is important because, as explained below, it only makes sense if the *"comercio"* referred to in Article VI is understood as trade in goods.

3.80. Before proceeding further, it must be stated that Costa Rica's translation of Article VI (taken from Costa Rica's *Application*), although broadly accurate, is not entirely correct. The original Spanish provides that Costa Rica will have the right of free navigation "*desde la expresada desembocadura [del rio San Juan] hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica.*"[258] More precisely rendered, this should read that Costa Rica has the right to navigate "from the said mouth [of the San Juan River] to three miles before arriving at the Castillo Viejo, [*con objetos de comercio*], whether it be with Nicaragua or to the interior of Costa Rica."

3.81. These differences, although subtle, are significant for at least two reasons. First, the fact that Article VI gives Costa Rica the right to navigate *"con objetos de comercio"*, "whether it be with Nicaragua or to the interior of Costa Rica" underscores the fact that the parties to the Treaty of 1858 understood that, by definition, *"comercio"* under Article VI came in just two varieties (i) with Nicaragua (including, of course, the port of San Juan del Norte) or (ii) to Costa Rica's interior. So understood, it becomes clear that, in context, the term can only mean "trade." Trade can be "with Nicaragua;" trade can also travel "from" the mouth of the San Juan "to the interior of Costa Rica." On the other hand, these limitations make little sense if the *"comercio"* referenced was intended to confer on Costa Rica some broadly defined right to navigate the San Juan for purposes beyond the trade in goods. With regard to that period, commerce "with Nicaragua" could only mean trade in goods. The same is true for "*comercio*" "to the interior of Costa Rica".

3.82. The use of the terms "from" ("*desde*") the mouth of the San Juan and "to" ("*a*") the interior of Costa Rica have a directional component, and highlight the fact that the parties very much had in mind *"comercio"* moving between locations outside and inside Costa Rica -- *i.e.*, foreign trade -- exactly as the history recounted above would suggest.

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[258] Costa Rica- Nicaragua Treaty of Limits (Cañas-Jérez), 15 April 1858. CRM, Vol. II, Annex 7(a).

3.83. The fact that the *"comercio"* referred to in the text of Article VI means trade in goods is still further underscored by the section of Costa Rica's Argument to President Cleveland highlighted above, at paragraphs 3.63-3.64 in which Costa Rica specifically links her right to navigate on the San Juan *"con objetos de comercio"* with the "transportation of merchandise." Here again, we have an obvious equation of the *"comercio"* of Article VI with trade in merchandise.

3.84. Viewed in the historical and linguistic context cited above, it is clear that the parties to the Treaty of 1858 understood *"comercio"* to include only trade in goods, not broader, modern conceptions of commerce that sweep up virtually any form of economic activity. So seen, the significance of the parties' dispute over the meaning of the term "*objetos*" largely vanishes. Even if -- *quod non* -- that word could bear the heavy load Costa Rica attempts to impose on it, and it could be construed to mean "objectives" or "purposes" rather than being limited to physical "objects," the fundamental meaning of the phrase *"con objetos de comercio"* is just the same. Under Costa Rica's reading, Article VI would give her the right to navigate the lower San Juan "for purposes of trade." Under Nicaragua's reading, on the other hand, Article VI would give Costa Rica the right to navigate the lower San Juan "with objects of trade." As the Court will appreciate, there is no meaningful difference between the two. In either case, Costa Rica's navigation rights are limited to the trade in goods.

(d) *The Nineteenth Century Treaties and Documents Cited by Costa Rica in the* Reply

3.85. Costa Rica tries to overwhelm the Court with a long table of documents from the nineteenth century in which she alleges the word "*objetos*" means "purposes."[259] According to Costa Rica, the table includes provisions from an "impressive number of relevant treaties, contracts and other instruments contemporary with the Treaty of Limits in which the term 'objetos' was overwhelmingly used as meaning 'purposes.'"[260] However, the great majority -- sixty out of seventy-six – of the provisions quoted, taken from thirty-one documents, do not speak of "*objetos*" but "*objeto,*" and therefore do not sustain Costa Rica's pretension, because Nicaragua does not question the different meanings that the word "*objeto*" may have in its singular form, but only rejects the meaning that Costa Rica pretends to give to the word "*objetos*" in plural, in particular when those objects are qualified by the words "*de comercio.*"[261]

3.86. To correctly interpret the phrase "*con objetos de comercio*" as it appears in Article VI of the Treaty of Limits, Nicaragua consulted one of the leading experts on Spanish vocabulary and grammar from the Spanish Royal Academy (*Academia Real Español*), Dr. Manuel Seco Reymundo, whose impressive curriculum is appended to his Formal Opinion (in Volume II of this *Rejoinder*, Annex 64. In his Formal Opinion, Dr. Seco explains that the Spanish word "*objeto*" is susceptible of two different meanings, each of which could correspond to the English word "object." According to Dr. Seco, "*objeto*" – in its singular form -- could mean either a tangible "object" or an intangible "objective" or "purpose." However, in its plural form ("*objetos*") the word only refers to tangible "objects," and not to "objectives" or "purposes." As stated by Dr. Seco, whose analysis of the topic included a review of the Table incorporated in Costa Rica's *Reply*:

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[259] *See* "Table 1: Use of the term '*objetos*' meaning 'purposes' in 19th Century documents". CRR, pp. 99-126.

[260] CRR, p. 62, para. 3.60.

[261] *See ibid.*

> "A simple review of the Costa Rica Table allows for a first general observation: use of the singular objeto is much more abundant than the plural objetos. Second, when it appears, it is mostly found in the sense of 'purpose or objective,' particularly in virtually lexicalized constructions, such as the prepositional phrase, con el objeto de (sometimes in variations, such as con objeto de, con el único objeto de and para el objeto de), or the adverbial phrase, con este objeto (and its variations, con tal objeto, con ese objeto, con el objeto expresado, para este objeto, and para el dicho objeto) – constructions that do not exist in the language for the plural form."[262]

3.87. In addition to the documents identified in the Table presented by Costa Rica in the *Reply*, Dr. Seco examined other examples of contemporaneous usage of the relevant language dictionaries of the period and other authoritative sources. He stated his conclusion thusly:

> "(...) Consequently, based on all the information studied, my conclusion is that, in the text of Article VI of the Border Treaty between Costa Rica and Nicaragua signed on April 15, 1858, the phrase con objetos de comercio should be understood as 'with things on which commercial activity falls.'"[263]

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[262] Seco Opinion, *op. cit.*, paras. 8-9. NR, Vol. II, Annex 64.

[263] *Ibid.*, para 14.

3.88. As indicated, only 16 of the 76 references to "*objeto*" or "*objetos*" provided by Costa Rica in her Table use the plural form of the word, which is the form used in the Treaty of Limits. Besides Dr. Seco's Formal Opinion, which refutes Costa Rica's attempt to interpret "*objetos de comercio*" as "purposes of trade," there are still other reasons why her Table is unimpressive. First, in ten of those 16 references the expression "*objetos*" is not accompanied by the expression "*de comercio*."[264] Second, four of the remaining six examples refer to the right of the citizens of the parties to "*alquilar y ocupar casas y almacenes para los objetos de su comercio*" (hire and occupy houses and warehouses for the "*objetos*" of their "*comercio*") in which "*objetos*" can only mean goods or articles, since "purposes" and "objectives" cannot be stored in houses or warehouses[265]. Third, the two remaining examples are those of the very Article VI of the 1858 Treaty, and the Cleveland Award, whose interpretation is at the centre of the controversy in this case[266]. So what Costa Rica demonstrates is just the opposite of what she pretends. "*Objetos de comercio*" are only goods in the nineteenth century; they are not "objectives" or "purposes." Costa Rica cannot present even a single document to support a different conclusion.

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[264] *See* "Table 1: Use of the term '*objetos* meaning "purposes" in 19th Century documents'. CRR, pp. 99-126: Doc. 3 (art. 37, at p. 101), 7 (arts. 3 and 7, at p. 106), 10 (art. VIII, p. 109), 11 (preamble, at p. 110), 14 (arts. I and VII, at p. 112), 15 (arts. VII y XIX, at. P. 113), and 28 (para. V, at p. 123).

[265] *See ibid.* CRR, pp. 99-126: Doc. 6 (art.II, at p. 105), 9 (art. II, at p. 107), 12 (art. II, at p. 111) and 16 (art. II, at p. 114). In two of the nineteenth century treaties between the United States of America and Nicaragua (Cass-Irisarri, of 16 November 1857, and Lamar-Zeledón, of 16 March 1859), there is a common Article II which translates "*para objetos de su comercio*" as "for the purpose(s) of their commerce;" (CRR, pp. 60-62, para. 3.55-3.59) according to Costa Rica these expose "the fallacy of Nicaragua's arguments…by reference to instruments contemporary to the 1858 Treaty of Limits." (CRR, p. 60, para. 3.55) But Costa Rica's confidence in these treaties, which were never ratified, is misplaced. The provision on which Costa Rica relies is actually a model provision common to all U.S.-Nicaragua treaties of the period,, which date back to and were copied directly from the Treaty of Amity, Commerce and Navigation, of 10 July 1851, whose Article II provided: that the citizens and subjects of both countries had the freedom to let and occupy houses and warehouses "*para los objetos de su comercio*." (CRR, pp. 4-5, para 1.10-1.11) Thus, the "*objetos de comercio*" were quite obviously the goods that they bought and sold and, logically, deposited and saved in houses and warehouses. Or does Costa Rica suggest that purposes and objectives can be stored in warehouses?

[266] *See ibid.* CRR, pp. 99-126: Doc. 10 (art. 6, at p. 108), Doc. 28 (para. Segundo, at p.123).

3.89. Costa Rica enlarges her *Reply* with a second table on the terms used to refer to articles of trade, goods or things in nineteenth century documents[267]. This is even less helpful to her cause than the first table. The second table only demonstrates the richness of the language used when referring, within the ambit of commercial traffic, to *mercancías*, *mercaderías*, *artículos*, *cosas*, *productos*, *bienes*, *frutos*, *efectos*, *materiales*, *géneros*, *producciones*, *manufacturas* and, of course, *objetos*, which are translated into English as merchandise, articles, things, products, goods, wares, effects, stock, items, materials, manufacture, and objects. It is curious, and worthy of notice, that only when Costa Rica herself provides the English translation of the term "*objetos*" -- in four cases (numbers 2, 13, 17 and 22) -- does it turn out to be "objects," while in the other three cases included in her list, where the translation of "*objetos*" is provided by an independent, contemporaneous source, the English word chosen is "things" (number 23), "goods" (number 25) or "articles" (number 26). Nicaragua's conclusion is thereby further reinforced; in the nineteenth century "*objetos de comercio*" could only be tangible goods[268].

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[267] *See* "Table 2: Terms to refer to articles of trade, goods, things, etc. in 19th Century documents". CRR, pp. 127-151.

[268] *See* Letter from Neil Johnstone, Director of the Language Services and Documentation Division of the WTO to Alicia Martín, Permanente Representative of the Republic of Nicaragua before the Office of the United Nations, 12 October 2006. NR, Vol. II, Annex 63 (stating "although the Organization has not found documents in its possession in which the expression 'objetos de comercio' appears, the Division can nevertheless indicate English expressions, such as 'articles of trade' and 'wares', which have been translated into Spanish as 'objetos de comercio' (for instance, in documents WT/DS/236/R, WT/DS/257R and WT/DS/257ABR).").

Section II. The Treaty Does Not Empower Costa Rica To Perform Passenger Or Other Services, Nor Does It Have An Evolutionary Character

A. THE EVIDENCE CONCERNING PASSENGER TRAFFIC

3.90. The fact the parties intended to limit Costa Rica's navigational right to the transport of trade goods is still further confirmed by the fact that, historically, it was Nicaragua -- and only Nicaragua -- that ever authorized passenger traffic on the San Juan River. If the parties had intended to give the term *"comercio"* the broad sweep that Costa Rica now contends -- *i.e.* if they had meant also to include services such as the transport of passengers or tourists -- one would expect to see evidence in the record that Costa Rica had authorized such transportation sometime after the Treaty of 1858 and before the current dispute over tourism erupted in the 1990s. There is, however, no such evidence, which further highlights the limited nature of Costa Rica's right under Article VI.

3.91. The facts on this score are not in dispute. As stated in the *Counter-Memorial* at paragraphs 1.3.9 through 1.3.22 (concerning the pre-1858 period) and 4.1.37 to 4.1.45 (concerning the period thereafter), the transport of passengers through the San Juan -- the most lucrative business at the time the Treaty of 1858 was executed -- was authorized by Nicaragua alone. Nicaragua identified no fewer than eight conventions, treaties or contracts relating to that subject, including:

- the 1849 contract with the American Atlantic and Pacific Ship Canal Company;
- the 1851 White-Chamorro-Mayorga Canal Convention;
- the 1857 Irisarri-Stebbins Contract;
- the 1857 Cass-Irisarri Treaty;

- the 1860 Zeledón-Rosa Pérez Convention;
- the 1863 Molina -Morris contract;
- the 1877 Pellas Contract; and
- the 1887 Cardenas-Menocal Contract.

3.92. In her *Reply*, Costa Rica neither disputes nor takes issue with Nicaragua's characterization of any of these facts. They may therefore be taken as admitted. Costa Rica confines herself to a three paragraph response contending: (1) that the Treaty of 1858 does not use express language to exclude the transport of passengers; (2) that Nicaragua was careful not to deny Costa Rica's right to transport persons on the San Juan; and (3) Nicaragua's exclusive exercise of the privilege of granting concessions over inter-oceanic transit "bears no relation" to Costa Rica's rights under Article VI[269]. None of these arguments disproves Nicaragua's point.

3.93. With respect to Costa Rica's first argument, it is Nicaragua's position that the wording of Article VI, which ties Costa Rica's freedom of navigation to navigation with "articles of trade" does, in fact, expressly exclude passenger transportation. Even accepting Costa Rica's (incorrect) argument that *"con objetos de comercio"* means "for purposes of trade", the fact remains that the transport of passengers (and certainly of tourists) is beyond the limits of the term *"comercio"* as the term was understood in 1858. As demonstrated above, *"comercio"* was understood in the mid-nineteenth century to embrace only trade in goods. Contrary to Costa Rica's assertion (at paragraph 3.76 of her *Reply*) that

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[269] CRR, paras. 3.76 - 3.78.

"there is nothing in the record that supports the notion that this [*i.e.*, the exclusion of passenger transport] was the intention of the parties," the truth is very much the opposite. According to multiple Costa Rican historical sources, the intention of the parties was plainly limited to affording Costa Rica an Atlantic outlet for her export and import trade. By the admission of her own negotiator at the time, Costa Rica's motivating "vital need" was to get her exports to the European market more quickly, not to send tourists down the river on sightseeing excursions. There is no evidence that Costa Rica sought access to the San Juan for the transport of tourists or other passengers; and there is no evidence that before or after the 1858 Treaty was executed, for at least the next 130 years, Costa Rica issued any licenses or other official authorizations of passenger services on the river.

3.94. To support her second argument (that Nicaragua "was careful" not to deny Costa Rica's right to transport "persons and property"), the *Reply* cites Nicaragua's treaties of friendship, commerce and navigation with the United States, France and Great Britain in 1857, 1859 and 1860, respectively. The treaties contain a substantially identical provision toward the end of each that provides that "nothing contained in this treaty shall be construed to affect the claim of the government and citizens of the Republic of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean."[270] These provisions cannot be construed as an endorsement of Costa Rica's "right" to transport passengers on the San Juan. *First*, none of these treaties purports to or could modify the plain provisions of the Treaty of 1858. *Second*, the treaties subsequent to 1858 all appear to have imported wholesale exactly the same language from the earliest treaty as a model provision. They too shed little light on the meaning of the Treaty of 1858. *Third*, it is noteworthy that the provisions refer to Costa Rica's "claim" not "right." This is hardly a recognition of an entitlement on the part of Costa Rica. *Fourth*, and finally, given the context of these treaties, all of which were very much trade-related treaties, it is most logical to interpret the phrase "persons and property" appearing in them as embracing Costa Rican merchants and crews together with their articles of trade, not passengers travelling down the river on sightseeing expeditions or other non-trade related missions. The fact that these treaties are Costa Rica's only "evidence" of Nicaragua's non-denial of her "right" to transport passengers on the San Juan proves only the weakness of her argument. Costa Rica is unable to present a single document, letter, note, or statement by Nicaragua -- pre- or post-dating the 1858 Treaty -- in which Nicaragua acknowledges, accepts or acquiesces in an alleged right of Costa Rica to transport or authorize the transport of passengers. All of Nicaragua's statements on the subject are to the contrary.

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[270] *E.g.*, CRR, Vol. II, Annex 10 (U.S.).

3.95. Costa Rica's third argument (namely, that Nicaragua's exclusive granting of concessions for inter-oceanic transit on the San Juan "bears no relation" to Costa Rica's rights under Article VI) is also flawed. The point is that the undisputed evidence shows that Nicaragua has been and is the only party granting authorizations for the transportation of passengers on the San Juan River. No evidence has been submitted by Costa Rica to show that she ever authorized the transportation of passengers (or, indeed, any other service activity that might now be associated with more modern notions of "commerce") on the San Juan at any time between 1858 and the outbreak of the current dispute in recent years. That there is no such evidence further confirms that the scope of Costa Rica's navigation rights is limited to the transport of goods.

B. THE PARTIES DID NOT GIVE THE 1858 TREATY AN EVOLUTIONARY CHARACTER

3.96. Costa Rica argues that, even if the parties in 1858 did not contemplate that "*objetos de comercio*" might include passengers and/or tourists, the Court should give the phrase an evolutionary interpretation of the notion and content of "commerce," which now (more than a century later) includes not only goods but also services, such as tourism[271]. Nicaragua believes that such an assertion is void of any foundation because it finds no support in the express or implied intention of the parties, either in 1858 or subsequent thereto; nor is it possible to deduce such an understanding from the practice followed by the parties in their application of the Treaty, or to reconcile it with the object and purpose of Article VI of the Treaty, which, as shown, was to afford Costa Rica a trade route for her export and import of goods.

3.97. It bears repeating that the 1858 Treaty is a treaty of territorial limits. Such was the name given by the drafters. Such is its nature. Its contents correspond to that nature. It is not a treaty of decolonization, nor is its subject matter the protection of human rights or the environment. In a treaty concerning territorial sovereignty, the jurisprudence affirms that limitations to the State's sovereignty, in case of doubt, shall be interpreted narrowly. This principle has already been discussed in Chapter II, at paragraphs 2.22-2.35 and 2.110-2.113.

3.98. Treaties of limits, like the 1858 Treaty, enjoy special stability, for obvious reasons: opening them to an "evolutionary" interpretation undermines the permanence of established boundaries and encourages conflicts that may result from unstable borders. Courts and arbitral tribunals have been sensitive to this problem. Thus, it has been decided that a concession awarded in a State's maritime jurisdiction does not generate rights in the continental shelf, after the State has extended her maritime jurisdiction into this area, because it may not be presumed that the sovereign intended her initial concession to have an evolutionary character[272]. The same point is illustrated by the fact that, when a State limits the areas subject to her jurisdiction which may be the subject of dispute resolution, the limitation extends to the subsequently-claimed continental shelf[273]. As more fully discussed in Chapter II, at paragraphs 2.56-2.57, the common thread in these cases is that care must be taken to avoid evolutionary treaty interpretations that result in limiting or diminishing the sovereignty of a State. For all the reasons stated in this chapter, there is no room for doubt that Costa Rica's navigation right under Article VI of the Treaty of Limits is limited to navigation with articles of trade. However, since Costa Rica disputes that interpretation, any doubt that she might have succeeded in raising about the meaning of Article VI must be resolved with due regard for Nicaragua's sovereignty, and in a manner that, to the fullest extent possible, avoids diminishing it.

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[271] *See e.g.*, CRM paras. 4.66-4.72; CRR paras. 2.43-2.49.

3.99. The conclusion is as obvious as it is inevitable. Even if Article VI of the 1858 Treaty created for Costa Rica a right of navigation "for purposes of commerce," the commercial purposes would be defined by the concept of commerce in force at the time of conclusion of the Treaty, and therefore, they would be limited to the trade of merchandise, goods, products, and articles, i.e.

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[272] *See* Arbitral Award, Petroleum Development Ltd. v. Sheik of Abu Dhabi, 28 Aug. 1951, *International Legal Materials*, 1951, p. 144.

[273] *See* Judgments, Aegean Sea Continental Shelf, 19 Dec. 1978, *ICJ Reports*, 1978, p. 32; discussed in NCM, paras. 4.3.10 - 4.3.19.

tangible things, excluding a sector, that of services, which was only much later, after the passage of more than a century, understood to come within the definition of "commerce."

CHAPTER IV:

THE REASONABLENESS OF NICARAGUA'S REGULATION OF NAVIGATION ON THE SAN JUAN RIVER

4.1. Costa Rica alleges that Nicaragua has denied and breached her right to navigate on the San Juan River "*con objetos de comercio*." Nicaragua submits, and the evidence confirms, that she has never denied or breached this right. As will be shown below, Costa Rica has submitted no evidence whatsoever that Nicaragua ever denied, limited or interfered with her navigation on the San Juan River related to the trade in goods. To the contrary, the evidence shows that Nicaragua has always respected this right. Nor has Nicaragua prevented Costa Rica from navigating on the river for purposes of tourism or passenger transport -- although, by virtue of her exclusive dominion and supreme control (*sumo imperio*) over the river she has the right to prevent these services from being performed. Rather, in the exercise of her sovereign discretion, Nicaragua has expressly authorized navigation by Costa Rica for these purposes, subject to reasonable regulations specifically crafted to protect Nicaragua's legitimate sovereign interests, especially her interests in navigational safety, environmental protection, law enforcement and border security[274].

4.2. Costa Rica objects to Nicaragua's exercise of her regulatory powers over navigation on the San Juan River, even though these regulations are applied without discrimination to all vessels, including Nicaraguan vessels. Costa Rica asserts that her "right of free navigation" necessarily implies that she is exempt from regulation by Nicaragua, regardless of Nicaragua's acknowledged status as sovereign over the river, and notwithstanding the reasonableness or evenhandedness of Nicaragua's regulations. This chapter will demonstrate the lack of merit to Costa Rica's assertions, and both the right of Nicaragua to regulate navigation on the San Juan River, and the reasonableness of the regulations Nicaragua has implemented in furtherance of her legitimate sovereign interests.

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[274] Nicaragua has permitted tourism by Costa Rican vessels as a gesture of good neighbourliness, but expressly reserves her rights to oppose this practice in the future.

Section I. Costa Rica's Navigation on the River is Subject to Reasonable Regulation by Nicaragua

4.3. As demonstrated in Chapter III, the object and purpose of according Costa Rica the right of free navigation on the lower San Juan *"con objetos de comercio"* was to give her the Atlantic trade outlet that she considered so essential in the middle of the 19th century. As such, and especially given the limited scope of the term *"comercio"* prevailing at the time, it is clear that the makers of the Treaty of 1858 did not intend to convey to Costa Rica the right to navigate the river for purposes other than trade in goods.

4.4. Even if Nicaragua is wrong about this, however, it does not follow that Costa Rica has an unbridled right to navigate the San Juan for all commercial purposes such as transit of passengers or tourists, without having to submit to regulations of any kind. Nicaragua has demonstrated in the *Counter-Memorial* and again in Chapter II of this *Rejoinder*, that the mere presence of the term "free" in Article VI of the Treaty of 1858 cannot bear the heavy load Costa Rica attempts to place on it[275]. In particular, given the Treaty's express recognition of Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the river, she must retain the power to impose reasonable regulations that are necessary to protect her legitimate sovereign interests in the San Juan.

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[275] *See* NCM, paras. 4.1.4 - 4.1.48.

4.5. Not only is there nothing inconsistent between this sensible conclusion and the use of the term "free" in Article VI, it actually follows inevitably from the fact that this *same article* leaves to Nicaragua -- and Nicaragua alone -- the "exclusive dominion and supreme control (*sumo imperio*)" over the waters of the San Juan. If Costa Rica were correct that Nicaragua is barred from exerting any regulatory control of any kind over Costa Rican commercial traffic, the effect would be to create a lawless zone in which Costa Rican commercial vessels could operate with impunity. Taken to its logical conclusion, for example, Costa Rica's argument would dictate that Nicaraguan authorities would have no choice but to stand idly by even as a Costa Rican commercial ship polluted the river and wantonly flouted Nicaraguan environmental laws designed to protect the exquisite natural beauty and endangered aquatic species of the San Juan (about which more will be said below). Such a patently absurd result cannot stand.

4.6. The law, fortunately, is otherwise. As demonstrated in Chapter II, Section I, at paragraphs 2.58-2.81, a right of free navigation on the river or lakes of another State does not deprive the sovereign of its inherent authority to regulate that navigation in conformity with its own legitimate interests, provided such regulation is reasonable, fair, and non-discriminatory. As shown below, Nicaragua's regulation of navigation on the San Juan River meets that test.

Section II. The Evidence Regarding Costa Rica's Exercise of her Right of Navigation "*Con Objetos de Comercio*," and Nicaragua's Non-Interference with that Right

4.7. Costa Rica's written pleadings -- both her *Memorial* and her *Reply* -- are remarkable for how little they say about her actual navigation on the river *"con objetos de comercio"* between 1858 and the early 1990s. This can hardly be an oversight. To the contrary, it is reflective of the evidence that: for the first 130 years after the Treaty of Limits was executed there was very little Costa Rican commercial navigation on the river; it was all local in nature; and it consisted entirely of trade in goods between Costa Rican riparian hamlets and the interior of the country, and to a lesser extent between those hamlets and the Nicaraguan town of San Juan del Norte, located at the mouth of the San Juan River.

4.8. As explained above, at paragraphs 3.21-3.31, for at least 20 years prior to the 1858 Treaty, Costa Rica sought access to the San Juan as a trade route for the coffee and other products she was exporting to Europe in the mid-nineteenth century. She coveted the San Juan route as a faster, lower-cost alternative to the shipment of her products from her Pacific Coast ports around Cape Horn and then across the Atlantic -- a route that was both prohibitively time-consuming and extraordinarily expensive. Costa Rica continually sought to secure as a matter of highest national priority a trade route that consisted of land transport from the central coffee-growing region to the Sarapiquí River, from there by boat to the San Juan River, down the San Juan to the Nicaraguan coastal port at San Juan del Norte, and from there across the Atlantic.

4.9. Navigation on the San Juan required Nicaragua's acquiescence, of course, and this Costa Rica repeatedly failed to obtain, until the 1858 Treaty was negotiated. Article VI of the Treaty responded directly to Costa Rica's need for the San Juan to serve as an outlet for her trade along the so-called "Sarapiquí route" (depicted in Sketch Map 1, following paragraph 3.31). Article VI did so by providing expressly for a "right of free navigation … *con objetos de comercio* either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica."

4.10. Costa Rica's commercial navigation rights on the San Juan lost their importance shortly after the Treaty was executed. The reasons are set forth above, at paragraphs 3.53-3.58, especially the construction of the first trans-isthmian railroad in Panama, the construction of Costa Rica's own railroad to her Atlantic Coast and the development of a major port there, and the diversion of the flow of the San Juan River upstream from San Juan del Norte to the Colorado River, closing off access to both the port and the sea to all but the smallest vessels. The result was: after 1860, when she closed her customs post on the Sarapiquí, Costa Rica abandoned any attempt to make significant commercial use of the river.

4.11. There is nothing in Costa Rica's written pleadings that contradicts any of these historical facts. In particular, Costa Rica presents no evidence that, after the 1858 Treaty was executed, she ever used the San Juan River to carry on any international trade, other than a small amount of trade with Nicaragua. There is no evidence of trade between Costa Rica and any country other than Nicaragua, let alone any country across the Atlantic, using the San Juan River. Indeed, Costa Rica has not described a single voyage on the San Juan destined for European or other Atlantic ports, has provided no data on exports (or imports) via the San Juan, and has presented no customs data reflecting commercial transit on the San Juan. Instead, what the evidence shows is that Costa Rica closed down her customs posts on the Sarapiquí River and along the San Juan long ago. Undisputed testimony establishes that Costa Rica has not maintained any customs posts anywhere along the San Juan, the Sarapiquí or San Carlos Rivers for at least the past 40 years.[276] These facts explain why Costa Rica has never employed vessels of her revenue service to protect any of her commercial navigation on the

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[276] *See* Affidavit of William Aburto Espinoza, 8 March 2008 (hereinafter "Aburto Affidavit"), para. 3. NR, Vol. II, Annex 65; *see also* Affidavit of Rigoberto Acevedo Ledezma, 7 March 2008 (hereinafter "Acevedo Affidavit"), para. 3. NR, Vol. II, Annex 66.

San Juan, as discussed more fully below in Chapter V. Simply put, since the anticipated commercial navigation on the river never materialized, and what little took place was not even sufficient to require the existence of customs posts, it was hardly of such character or volume as to necessitate protection by revenue service vessels.

4.12. Although Costa Rica has not used the San Juan as she initially envisioned – to carry her coffee and other products to European markets – her vessels have, in fact, navigated the river continually over the past 150 years *"con objetos de comercio."* The evidence shows that this form of navigation -- which was the only commercial navigation by Costa Rican vessels between 1858 and the 1990s -- consisted almost exclusively of local traffic, carrying foods and household goods between the interior of Costa Rica and her riparian communities on the right bank of the San Juan, and between those communities and San Juan del Norte. Costa Rica does not dispute this by presenting any evidence to the contrary. Eyewitness testimony confirms the nature of her navigation on the San Juan *"con objetos de comercio"* between the 1960s and the present. According to Edén Atanasio Pastora, who lived and worked in Costa Rica along the San Juan from the mid-1960s to the late 1970s:

> "During this period there was very little commercial traffic along the San Juan River. There was almost no trade between San Juan del Norte, which was the only Nicaraguan town along the entire length of the river, with the Costa Rican side….In the 1960s and 1970s there was some trade in goods between Puerto Viejo de Sarapiquí and Barra del Colorado [both in Costa Rica], which necessarily included transport along a portion of the San Juan River, but this was small and infrequent, and consisted only of some basic foods and other supplies. There were no customs posts anywhere along the river, and no international trade at all….The principal and most frequent use of the river by Costa Ricans during this entire period,

> from the 1960s to the 1980s, was by the local population that lived in the small settlements in Costa Rica's territory. They navigated the river in their small boats as part of their daily lives."[277]

4.13. The testimony of William Aburto Espinoza, a commercial boatman on the river in the 1960s and 1970s, is to the same effect:

> "During the 1960s, I worked on the river transporting fuel and sometimes commercial goods between communities located on the river. My river shipment business ended in the 1970s due to the onset of the war in Nicaragua. While I was working on the river, there were a few Costa Ricans and Nicaraguans who navigated the river like myself to transport goods from one community to another. None of these boatmen used the river for shipments outside the local river communities. The materials being transported on the river in the 1960s were mostly fuel, bananas, coconut oil, and wood, all from the same areas….During this time, there was very little activity on the river. I would roughly estimate that there were 150 families living along the entire bank of the San Juan River, including a small community with a school located at Sarapiquí….During the twelve hour trip between San Juan del Norte and El Castillo, I would normally see one or two boats on the river. Most of the boats I saw were small boats belonging to the local neighbors, who lived in Costa Rican territory, navigating short distances in their private boats for personal reasons."[278]

4.14. The low volume of local commercial and personal traffic on the San Juan during the 1960s and 1970s, according to the witnesses, came to a virtual halt between 1977 and 1990 as a result, first, of the Nicaraguan Revolution (in the late

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[277] Affidavit of Edén Atanasio Pastora, 10 March 2008 (hereinafter "Pastora Affidavit"), para. 6. NR, Vol. II, Annex 75.

[278] Affidavit of William Aburto Espinoza, 8 March 2008 (hereinafter "Aburto Affidavit"), paras. 2, 4. NR, Vol. II, Annex 65.

1970s) and second, the Counter-Revolution (during the 1980s), when the San Juan was at the heart of a combat zone. According to Mr. Pastora, who was a military leader of the Nicaraguan Revolution that overthrew the dictatorship of General Anastasio Somoza Debayle in the 1970s, and then, after 1982, a military leader of the counter-revolutionary forces opposed to the new Nicaraguan government, navigation on the San Juan:

> "…was reduced to a minimum during the height of the war years, 1977 to 1979 and 1982 to 1986, because of the extreme risk of going out on a river that was the center of a war zone, where every boat was a potential target of either the ARDE [counter-revolutionary] forces or the Sandinistas if it was suspected of belonging to or assisting the other side."[279]

4.15. According to Nicaraguan Army Colonel Bosco Centeno Aróstegui, who served as Commander to the revolutionary government's armed forces along the San Juan between July and December 1979, and again from 1982 to 1991:

> "For some time, after the triumph of the revolutionary forces and my arrival as Commander in July 1979, the region remained insecure. During that period, there was some commercial navigation on the river, but not very much. There was no international trade, only local trade between settlements on the river…There were no customs posts on the Costa Rican side of the river….The local traders who transported these goods, both Nicaraguans and Costa Ricans, operated their small boats freely along the river. There were no tourist excursions at the time….By 1982, when I returned to the region as Commander of the Southern Military Detachment, it had become a war zone again. Counter-revolutionary forces ("*contras*") had organized in Northern Costa Rica, along the right bank of the San Juan River, and they made frequent attacks and forays across it. The river was unsafe for navigation for the

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[279] Pastora Affidavit, para. 6. NR, Vol. II, Annex 75.

> rest of the 1980's, until the fighting ended in 1990 and the counter-revolutionary forces were fully demobilized in 1991. The *contras* fired at all our vessels that navigated the river and tried to sink them, and we did the same to all vessels that we believed were theirs or were bringing them supplies."[280]

4.16. Accordingly:

> "If there were any local trade, it would have been very minimal, given the great danger to which the boatmen were exposed if they were mistaken for an enemy by the contending military forces. There was definitely no trade with San Juan del Norte, which was isolated and incapable of obtaining supplies. As a result, the entire population abandoned the town..."[281]

Costa Rican boatmen, whose witness statements have been supplied by Costa Rica and annexed to the *Reply*, agree that the combat brought on by the Nicaraguan Revolution and Counter-Revolution made navigation on the San Juan extremely dangerous, and reduced commercial and personal use of the river to a bare minimum[282].

4.17. Costa Rican commercial navigation on the river returned to normal, such as it was, after peace was restored to Nicaragua and the San Juan River in the early 1990s. Normal meant, as it was before the two wars, that is, strictly local trade between Costa Rican riparian communities, and between those communities and the interior of Costa Rica. There was still no international trade carried out on the river -- not even trade between Costa Rica and Nicaragua. According to

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[280] Affidavit of Lieutenant Colonel Juan Bosco Centeno Arostegui, 9 March 2008 (hereinafter "Centeno Affidavit"), para. 4. NR, Vol. II, Annex 69.

[281] *Ibid.*

[282] *See* Affidavit of Marvin Hay González, 28 January 2006. CRM, Annexes, Vol. IV, Annex 91; *see also* Affidavits of Armando Perla Pérez, 28 January 2006: CRM, Annexes, Vol. IV, Annex 92; Windel Hodgson Hodgson, 28 January 2006. CRM, Annexes, Vol. IV, Annex 93; José Granados Montoya, 29 January 2006. CRM, Annexes, Vol. IV, Annex 94; Wilton Hodgson Hodgson, 1 February 2006. CRM, Annexes, Vol. IV, Annex 96.

Brigadier General Denis Membreño Rivas, military commander of the San Juan zone between February 1992 and December 1995:

> "The town of San Juan del Norte, at the mouth of the San Juan River, had been abandoned by its population during the 1980's, and remained unpopulated during my entire tenure. There were no other Nicaraguan settlements on the left bank opposite Costa Rica because the entire area is part of the Indio Maíz Biological Reserve, where human settlement is prohibited in order to preserve that natural environment and the rich biological diversity that exists there…
>
> [Thus,] the only trade that was carried out on that part of the river was on the portion between the Sarapiquí River and the Colorado River, which was used infrequently by Costa Rican boatmen in small boats transporting supplies from Puerto Viejo de Sarapiquí in Costa Rica, down the Sarapiquí River to the San Juan, and then east along the San Juan River as far as the Colorado River (a distance of approximately 24 km.), where they reentered and navigated Costa Rican waters until their destination at Barra del Colorado on Costa Rica's Atlantic Coast. These were mainly engaged in the delivery of supplies to the small hotels that were springing up in the area to service Costa Rica's then-nascent tourism industry in the region...The right of Costa Rican vessels to transport goods along this portion of the San Juan River was fully respected."[283]

4.18. By 1996, San Juan del Norte on the Nicaraguan coast had become repopulated, but only with a fraction of its former population, and some trade between that town and Costa Rican riparian communities has taken place. Otherwise, Costa Rican commercial traffic on the river remained limited to the exchange of goods between Costa Rican hamlets, and between them and Puerto Viejo de Sarapiquí.

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[283] Affidavit of Brigadier General Denis Membreño Rivas, 10 March 2008 (hereinafter "Membreño Affidavit"), paras. 3-4. NR, Vol. II, Annex 73.

4.19. The evidence on this point is undisputed: According to Nicaragua's regional military commander from January 1996 to October 1997, Brigadier General Cesar Ovidio Largaespada Pallavicini:

> "There was very little trade traffic on the river. The new residents of San Juan del Norte engaged in some minor commerce with Barra del Colorado, using the river, and there were occasional deliveries of basic supplies from Puerto Viejo de Sarapiquí to Barra del Colorado. But this kind of commercial traffic, carried on by small boats, was very infrequent. There was no truly international trade of any kind. There were no customs posts. There was a small number of boatmen, Nicaraguan and Costa Rica, engaged in this commercial navigation."[284]

4.20. This situation continued during the period from October 1997 to June 2000, when the senior Nicaraguan military officer for the San Juan region was Brigadier General Francisco Orlando Talavera Siles:

> "There is a very insignificant amount of river traffic dedicated to trade in goods between communities near the river….I recall that there was some small amount of trade between San Juan del Norte and Barra del Colorado, mainly in the transport and sale of shellfish. There was also a small amount of local trade between Puerto Viejo de Sarapiquí and a few of the communities on Costa Rican territory. This trade, or what there was of it, proceeded without interference."[285]

There is nothing in Costa Rica's evidence that contradicts this testimony.

4.21. Commercial navigation on the San Juan River, as described above, has remained the same, in terms of its local nature and low volume, to the present day. As testified by local boatman Rigoberto Acevedo Ledezma, who has been transporting goods in his own vessel between Puerto Viejo de Sarapiquí and San Juan del Norte for the past 10 years:

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[284] Affidavit of Brigadier General Cesar Ovidio Largaespada Pallavicini, 9 March 2008 (hereinafter "Largaespada Affidavit"), para. 7. NR, Vol. II, Annex 72.

[285] Affidavit of Francisco Orlando Talavera Siles, 19 May 2008 (hereinafter "Talavera Affidavit"), para. 7. NR, Vol. II, Annex 78.

> "My business involves transporting basic food supplies from Puerto Viejo to several small shops and restaurants located in San Juan…On the return, I rarely transport goods on the same route, as there is little commerce out of San Juan del Norte, except for an occasional delivery of coconuts to Puerto Viejo…During my trips, I have not seen many boats that transport merchandise. In the stretch between Puerto Viejo and San Juan…only I am dedicated to transporting goods. Until one year ago, there were two more Costa Rican boatmen who travelled this same route. Another two Nicaraguans cover the area between San Juan…and El Castillo, transporting products of basic necessity. Also, for the last ten years three boatmen have been navigating, two of whom are Costa Rican and one who is Nicaraguan, using the San Juan River to transport shellfish from San Juan…to Puerto Lindo, Costa Rica."[286]

4.22. Mr. Acevedo concludes, "I am not aware of any occasions when any of the Costa Rican boatmen who navigate the river taking goods either to Nicaragua or Costa Rica have been prevented from completing their trip by Nicaraguan authorities posted along their routes"[287]. Nor, apparently, is Costa Rica aware of any occasions when her commercial boatmen have been prevented by Nicaraguan authorities from completing their deliveries. Neither the *Memorial* nor the *Reply* identifies a single example.

4.23. Nicaragua affirms that she has never prevented a Costa Rican vessel, navigating the San Juan River *"con objetos de comercio"* from entering the river, or from completing its voyage on the river. There is nothing to the contrary in Costa Rica's written pleadings, including the annexes. Nicaragua has never prevented a Costa Rican vessel from entering the river or navigating on it for purposes of international trade, which was the navigation right secured by Costa Rica 150 years ago in Article VI of the Treaty of Limits. Nor has Nicaragua ever prevented a Costa Rican vessel from entering or navigating on the river for purposes of local trade, either within Costa Rica, or between Costa Rica and Nicaragua. Again, Costa Rica presents no evidence to the contrary. It is true that the *Reply* includes a section that bears the subheading: "Breaches of Costa Rica's Right of Navigation 'for purposes of commerce'", at paragraphs 4.25 to 4.49. But the text of that section only underscores Nicaragua's point: that Costa Rica has no evidence of any interference by Nicaragua with her right to navigate "*con objetos de comercio*." The incidents described by Costa Rica plainly do not involve navigation "*con objetos de comercio*," regardless of whether Nicaragua's translation ("with articles of trade") or Costa Rica's ("for purposes of commerce") is accepted. Rather, they all involve navigation by Costa Rican *public* vessels for *non-commercial* purposes, in particular law enforcement and the delivery of social services to riparian communities by Costa Rican governmental agencies. None of these governmental activities constitutes navigation "*con objetos de comercio*," and none is the subject of the navigation right afforded to Costa Rica under the 1858 Treaty, as will be further discussed in Chapter V of this *Rejoinder*.

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[286] Acevedo Affidavit, *op cit.*, paras. 1-2. NR, Vol. II, Annex 66.

[287] *Ibid.*, para. 4.

4.24. What this case is about, therefore, is not Nicaragua's denial of Costa Rica's commercial navigation rights under the 1858 Treaty, or her prevention or interference with the exercise of those rights, but Nicaragua's efforts to regulate navigation on the river, both by Nicaraguan and Costa Rican vessels, to which the regulations are equally and non-discriminatorily applicable. There is no dispute about the content of these regulations. Both Nicaragua and Costa Rica agree about what they are and what they provide. What is disputed is Nicaragua's right to enforce them.

4.25. The parties agree that Nicaragua requires all vessels -- including Nicaraguan vessels -- navigating on the San Juan River to: (i) report to the nearest Nicaraguan military post upon entering the river and register the names of passengers and crew members; (ii) undergo a safety inspection and obtain a departure clearance certificate showing that the vessel is seaworthy; (iii) report to other Nicaraguan military posts passed during the voyage, including the last such post before exiting the river; (iv) navigate only during daylight hours, except in cases of emergency; and (v) depending on the size and configuration of the vessel, hoist a Nicaraguan flag as a gesture of respect for Nicaragua's sovereignty over the territory[288].

4.26. It has already been demonstrated in Chapter II, Section I, that Nicaragua, which has "exclusive dominion and supreme control (*sumo imperio*)" over the San Juan, is empowered to regulate Costa Rica's navigation on the river, provided such regulation is reasonable, non-discriminatory, and in furtherance of legitimate sovereign interests. In the section that follows, it will be further demonstrated that the regulations described above fully satisfy this standard, and in particular that they are necessary measures to further Nicaragua's legitimate interests in environmental protection, crime prevention, navigational safety, and border security. Thus, to the extent that Costa Rica has exercised her right to navigate on the river "*con objetos de comercio*," Nicaragua has fully respected that right, has never denied it or prevented its exercise, and has done no more than apply in an even-handed manner such regulations as are reasonable and necessary for the furtherance of her legitimate sovereign interests.

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[288] *See* CRM, paras. 1.06, 3.39 and CRR, paras. 3.99, 4.05-4.06; *see also* Membreño Affidavit, para. 4. NR, Vol. II, Annex 73; Largaespada Affidavit, para. 7. NR, Vol. II, Annex 72; Talavera Affidavit, para. 6. NR, Vol. II, Annex 78; Affidavit of Colonel Ricardo Sánchez Méndez, 9 March 2008 (hereinafter "Sánchez Affidavit"), para. 7. NR, Vol. II, Annex 77; Army of Nicaragua, "Action Plan for Issuance of Departure Clearance Certificates in the San Juan River" (hereinafter "Action Plan"), 5 July 2001, Art. 6. NR, Vol. II, Annex 43.

4.27. Costa Rica claims that, under her definition of navigation "*con objetos de comercio*," she has a right to navigate on the San Juan not only for the commercial transport of goods, but also for the purpose of performing commercial services, including tourist excursions. There is no need to repeat here the legal arguments and evidence already presented in the *Counter-Memorial* and in Chapter III of this *Rejoinder*, which demonstrate that the Treaty of Limits confers no right upon Costa Rica to perform tourist, passenger transport or other services unrelated to the commercial transport of goods. But it is worth pointing out that, in practice, Costa Rica never claimed a right to conduct tourist excursions on the San Juan River until the early 1990s, more than 130 years after the 1858 Treaty was executed. To be sure, the *Memorial* and the *Reply* refer to four isolated instances in 1982 (which still was more than 120 years after execution of the Treaty), but there are no other tourist excursions mentioned by Costa Rica before the early 1990s. It will be recalled that between 1982 and 1990 the San Juan River was in the midst of a war zone, and no traffic on the river was safe. Because the counter-revolutionary forces were based on the Costa Rican bank of the river, and innocent commercial traffic had all but disappeared, the Nicaraguan Army stopped and searched all unfamiliar vessels as a security measure. This included the four incidents in 1982 involving privately-operated tourist boats mentioned in Costa Rica's pleadings. As acknowledged by Colonel

Centeno, the Nicaraguan Army's regional commander at the time: "We encountered a few tourism excursions in 1982, but not thereafter."[289]

4.28. Costa Rica provides no evidence on when, after peace was restored in Nicaragua in the early 1990s, her tourist boats began operating on the San Juan, or how frequently they ran, or how many tourists they carried. It therefore falls to Nicaragua to supply this information, in the interest of historical accuracy. While Nicaragua cannot pinpoint the exact date that Costa Rican vessels began carrying tourists to and along the San Juan, the evidence shows that these activities commenced in earnest at some time between February 1992 and December 1995, when Nicaragua's regional military commander was Brigadier General Denis Membreño Rivas:

> "During my tenure as Chief of the Military Detachment, there was a significant increase in the frequency of navigation of the lower part of the San Juan River by vessels carrying tourists. Some of the vessels were owned and operated by Nicaraguans, but the vast majority of them were Costa Rican. The principal route was from Puerto Viejo de Sarapiquí in Costa Rica down the Sarapiquí River to the San Juan River, then east along the San Juan River to the location known as Delta, where the Colorado River begins, and then down the Colorado (in Costa Rican waters) to Barra del Colorado or Tortuguero on the Costa Rican coast....Near the beginning of my tenure, no more than 10 tourists per month were transported along this route, one way or the other. However, by the time I left the Detachment at the end of 1995, the number increased to between approximately 200 and 700 tourists per month, depending on the season."[290]

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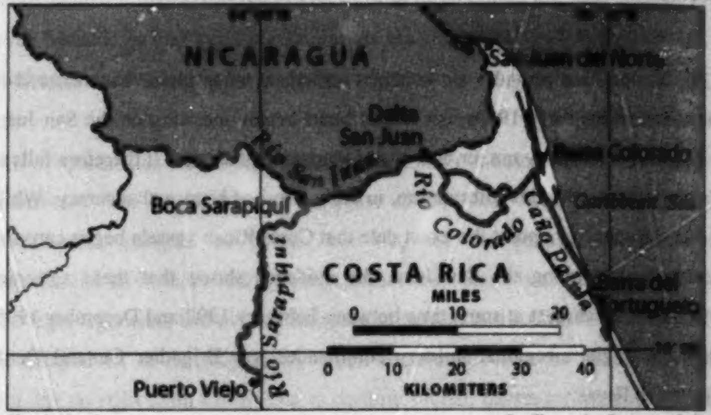
[289] Centeno Affidavit, para. 4. NR, Vol. II, Annex 69.

[290] Membreño Affidavit, para. 6. NR, Vol. II, Annex 73.

COSTA RICAN TOURISM ROUTE FROM 1990s TO PRESENT


NICARAGUA
San Juan del Norte
Delta San Juan
Río San Juan
Punta Colorado
Caribbean Sea
Boca Sarapiquí
Río Colorado
Caño Palacio
COSTA RICA
MILES
0
10
20
Barra del Tortuguero
0
10
20
30
40
KILOMETERS
Puerto Viejo
Río Sarapiquí

Sketch Map 3

For Illustrative Purposes Only

4.29. This large increase in traffic along the river raised several concerns for Nicaragua. As explained by Brigadier General Membreño:

> "First, as a sovereign State, Nicaragua needed to assure the safety and security of all transportation in its waters, including transportation by foreign vessels carrying foreign citizens. Second, Nicaragua had a need to assure that the fragile ecology of the Indio Maíz Biological Reserve and the San Juan River were protected. To accomplish these objectives, Nicaragua not only required all tourist boats (including those owned and operated by Nicaraguans) to register at the closest military post to their point of entry of the river, and to undergo a safety inspection and obtain a departure clearance certificate; it also required all passengers and crews to carry valid passports, and all passengers to purchase tourist cards for US$ 5 per passenger and to pass through Nicaraguan immigration on entering and exiting Nicaragua. These were the same requirements applied to all foreign citizens upon entering

> Nicaragua at any of its border posts….Nicaragua required that all vessels report to the nearest military post when they left the San Juan River, as well as when they entered it. This was to assure that the full complement of passengers who entered Nicaragua were leaving, and that none had disembarked illegally in Nicaraguan territory, especially in the Biological Reserve."[291]

These requirements have been in force ever since, and for the same reasons given by Brigadier General Membreño[292].

4.30. Although Costa Rica complains that Nicaragua has denied her alleged right under the 1858 Treaty to navigate the San Juan River for the commercial purpose of conducting tourist excursions, she fails to identify a single incident in which Nicaragua prevented a Costa Rican tourist boat from entering or navigating on the San Juan, or from completing its journey on the river (apart from the wartime security measures carried out in 1982). There is no evidence, other than from 1982, that Nicaragua ever detained a Costa Rican tourist vessel, denied its entry on the San Juan, or prevented it from navigating on the river. And Nicaragua affirms that, although she has a right to prevent Costa Rican vessels from engaging in tourist excursions on the river -- since Costa Rica has no right to navigate on the river for such purposes -- she has never done so.

4.31. Consequently, and once again, this case is not about Nicaragua's denial of Costa Rica's alleged navigation rights under the 1858 Treaty; it is a case concerning Nicaragua's efforts to regulate navigation (Nicaraguan as well as Costa Rican) in a reasonable manner and in furtherance of legitimate sovereign interests. The regulations that Nicaragua imposed on Costa Rican (and

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[291] *Ibid.*, para. 7.

[292] *See* Largaespada Affidavit, paras. 9-10. NR, Vol. II, Annex 72; *see also* Talavera Affidavit, para 6. NR, Vol. II, Annex 78; Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

Nicaraguan) tourist vessels are identified above, in paragraph 4.25. More will be said about these regulations and the justifications for them in the following section of this chapter.

4.32. Before proceeding to that discussion, however, two points bear mention. *First*, as indicated above, the regulations about which Costa Rica now complains have been in effect since at least the time of Brigadier General Membreño's tenure as Nicaragua's regional military commander, that is, since some time prior to December 1995. This date is significant in light of Costa Rica's repeated assertions that Nicaragua did not begin to violate her rights under the 1858 Treaty in a systematic manner until 1998 (and more particularly, until July 1998)[293]. Costa Rica does not explain how the same Nicaraguan regulations that were continuously in effect since prior to December 1995 *did not* constitute violations of her Treaty rights before July 1998, but somehow *became* Treaty violations thereafter. Costa Rica's silence on this point exposes a fundamental flaw in her case: she offers no serious argument against the lawfulness and reasonableness of the measures Nicaragua has taken to regulate, in a non-discriminatory manner, navigation on the San Juan River.

4.33. *Second*, although Costa Rica alleges that, as a result of Nicaragua's regulatory practices there has been a sharp drop in Costa Rican tourism along the San Juan, and grave economic harm to her tourism industry, she offers no data to support these allegations. Nowhere does Costa Rica provide any evidence on the number or frequency of tourism excursions, or the number of tourists – either before, during or after Nicaragua's regulations went into effect. On this ground alone, the claim that Nicaragua's regulations have unreasonably imposed a burdensome limitation on Costa Rica's exercise of her navigation rights must be rejected. But there is more. The table below was compiled from registration forms maintained at Nicaragua's Sarapiquí border post, which is the principal point of entry for Costa Rican tourist vessels traversing the San Juan from west to east, and the principal point of exit for these vessels travelling in the opposite direction. As such, it is the Nicaraguan border post where virtually all Costa Rican tourist vessels report, and register how many tourists they are carrying, as well as their names and countries of origin. The table shows that Costa Rican tourism along the San Juan River actually *increased* after 1998, when Nicaragua supposedly began violating Costa Rica's Treaty rights in a systematic way, and that it remained at healthy, elevated levels through the end of 2004, the last full year before the present conflict erupted and these proceedings were commenced (excluding 2001, for which no records were available). These figures demonstrate that there is no merit to Costa Rica's unsupported allegation that Nicaragua's regulations have caused a reduction in her tourism activities on the San Juan, much less a harm to her tourism industry.

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[293] *See, inter alia,* CRM, paras. 3.02, 3.21-3.29, 4.104-4.106; *see also*, CRR, paras. 3.23, 3.87, 3.91, 3.100, 3.141, 4.01, 4.50.

Table 1. Sarapiquí Border Post Tourism Registry (1997-2004)[294]

	1997	1998	1999	2000	2001	2002	2003	2004
USA	230	230	121	576		868	1177	976
GERMANY	176	111	49	110		182	139	125
FRANCE	5	12	7	41		105	214	231
COSTA RICA	39	112	162	270		414	336	144
SPAIN	14	99	2	275		133	168	103
CANADA	21	24	14	148		101	133	121
ITALY	6	5	3	33		49	144	118
ENGLAND	19	58	24	99		184	357	418
ALL OTHERS	93	60	80	291		369	612	354
Registered TOTAL	**603**	**711**	**462**	**1,843**	**N/A**	**2,405**	**3,280**	**2,590**

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[294] *See* Affidavit of Martín Antonio Jarquín López, 4 June 2008, para. 5. NR, Vol. II, Annex 71.

Section III. The Reasonableness of Nicaragua's Regulations and the Important Interests That They Serve

4.34. The regulations which Costa Rica now claims violate her right to navigate the San Juan freely are all necessary to protect Nicaragua's legitimate sovereign interests. Costa Rica complains about six categories of regulations: (1) the requirement to stop at Nicaraguan posts to register; (2) the requirement to obtain a departure clearance certificate; (3) the prohibition on navigation at night; (4) the prohibition on certain fishing activities; (5) the requirement to undergo immigration processing; and (6) the requirement to fly the Nicaraguan flag. In the following sections of this chapter, Nicaragua will show that each of these requirements is tailored to protect one or more (indeed, in most cases, more) of Nicaragua's sovereign interests in (a) environmental protection, (b) control and prevention of crime, (c) navigational safety, and (d) border protection. It cannot be denied that these are all legitimate and important national interests. Nor can it be shown that any of Nicaragua's regulations imposes an impediment to Costa Rican navigation. At worst, they constitute *de minimis* inconveniences whose reasonableness and necessity more than balance out these minor intrusions.

A. ENVIRONMENTAL PROTECTION

4.35. Nicaragua has an impressive wealth of biodiversity consisting of hundreds of species of flora and fauna which thrive in ecosystems throughout the country. The area including and surrounding the San Juan River is especially rich, and Nicaragua has invested considerable efforts in crafting and enforcing the laws and regulations necessary to protect and conserve these delicate ecological areas.

1. Protected Areas

4.36. There are three Nicaraguan nature preserves on or near the San Juan River: (i) the Indio Maíz Biological Reserve, bordering the Nicaraguan side of the river; (ii) the San Juan River Wildlife Refuge, consisting of the river itself and a two-kilometre strip abutting the Nicaraguan bank[295]; and (iii) the San Juan River - Nicaragua Biosphere Reserve, which is affiliated with UNESCO's Man and Biosphere project and encompasses the other reserves.

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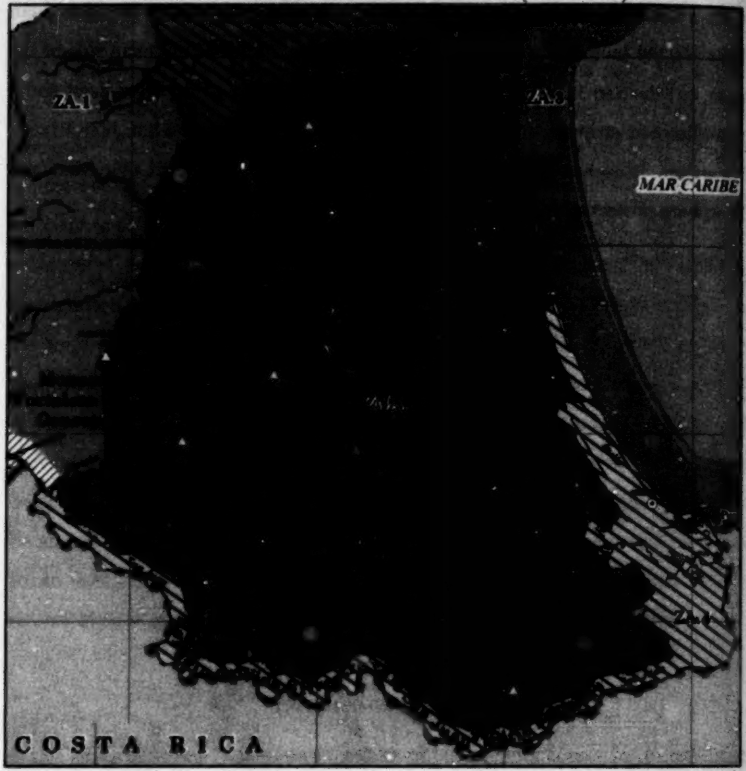
[295] *See* Nicaragua, Decree 66-99, Art. 3.5. NCM, Vol. II, Annex 61.

THE INDIO MAÍZ BIOLOGICAL RESERVE (DARK GREEN) AND THE SAN JUAN RIVER WILDLIFE REFUGE (YELLOW)


ZA.1
ZA.3
MAR CARIBE
COSTA RICA

Sketch Map 4 For illustrative purposes only

(a) *The Indio Maíz Biological Reserve and San Juan River wildlife refuge*

4.37. Southeastern Nicaragua is particularly rich environmentally. On 17 April 1990, the Government of Nicaragua created the San Juan River Indio Maíz Biological Reserve, along with three other protected areas located within the greater southeast region of Nicaragua[296].

4.38. The original footprint of this Reserve covered 435.5 km². Since then, Nicaragua has increased its size to 3,157 km² [297]. In addition to a large expanse of land, the Reserve as originally created also included most of the lower San Juan River extending to the Caribbean Sea. The protected part of the river was designated as a separate reserve in 1999, as discussed below.

4.39. The Indio Maíz Reserve is comprised of a complex variety of ecosystems, including humid tropical forests, continental wetlands, mangroves, estuaries, and salt marshes[298]. These ecosystems support a remarkable number of animal species, including hundreds of different bird species and mammals such as sloths, wild boars, pumas, pacas, manatees, and monkeys, as well as poison dart frogs, snakes, crocodiles, turtles, and iguanas[299]. It is estimated that the Reserve hosts

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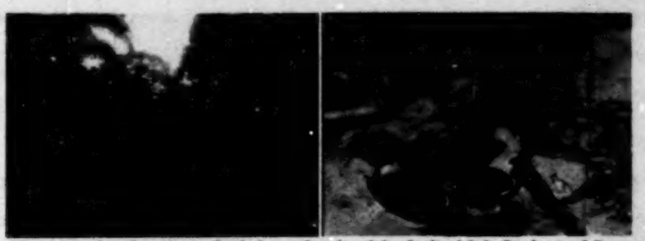
[296] *See* Nicaragua, Executive Decree 527. NCM, Vol. II, Annex 58. The same decree which designated the reserves also established a National Commission to manage and develop the protected areas of the Southeast of Nicaragua.

[297] *See* MARENA, *Southeastern Nicaragua Biosphere Reserve: Strategic Program 2008* (hereinafter "Strategic Program 2008"). NR, Vol. II, Annex 47.

[298] *See ibid.*; *see also* Meyrat, Alan. *The Biological Stretch of Southeast Nicaragua: Important Space for the Conservation of Nature.* MARENA-ARAUCARIA, 2006 (hereinafter "The Biological Stretch"), 2006. NR, Vol. II, Annex 41.

[299] *See* Affidavit of Benedicto Adam Borges Requenes, 26 May 2008 (hereinafter "Borges Affidavit"), para. 5. NR, Vol. II, Annex 67.

221 species of bird[300], 65 mammal species[301], 34 amphibian species, 55 reptiles, and 57 species of insect[302]. Many of these animals, which can be sold on the black market for substantial sums, are attractive targets for poachers.



Photographs above: on the left, wetlands of the Indio Maiz Biological Reserve; on the right, a Poison Dart Frog. The San Juan River Wildlife Refuge

4.40. In May 1999, Nicaragua created the Southeastern Biosphere Reserve of Nicaragua, which includes seven protected areas[303]. One of these protected areas is the San Juan River Wildlife Refuge, which was carved out of the Indio Maíz Reserve. This conservation area encompasses the lower San Juan River from its junction with the Bartola River to the Caribbean Sea, covering the entire portion of the San Juan where the left and right banks belong, respectively, to Nicaragua and Costa Rica. The San Juan River Wildlife Refuge also includes a two-kilometre strip of land extending north from the river's left (Nicaraguan) bank to the southern edge of the Indio Maíz Reserve[304].

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[300] *See* MARENA, *Indio Maiz Management Plan: 2005-2010 Period* (hereinafter "Indio Maiz Management Plan"), 9 May 2006. NR, Vol. II, Annex 42.

[301] *Ibid.*

[302] *Ibid.*

[303] *See* Nicaragua, Decree 66-99, Art. 2. NCM, Vol. II, Annex 60.

[304] *Ibid.*, Art. 3.7.

4.41. In 2001, the San Juan River Wildlife Refuge was designated as a wetland of international importance by Nicaragua under the Convention on Wetlands of International Importance (the Ramsar Convention)[305]. As a party to the Convention, Nicaragua agreed to the international standards of conservation and environmental management set forth therein. The protection of the San Juan thus became an internationally recognized and monitored priority. According to UNESCO, the San Juan River Wildlife Refuge and the adjoining Indio Maíz Reserve form part of "one of the two most extensive biological nuclei of the Mesoamerican Biological Corridor"[306].

4.42. The San Juan River Wildlife Refuge encompasses a variety of wetlands, including estuaries and shallow marine waters, coastal freshwater lagoons, and inter-tidal marshes, as well as permanent lakes, rivers, and pools. These wetlands support a large diversity of bird, fish, crustacean, and mammal (both aquatic and terrestrial) species. Scientific expeditions have identified 303 bird species, 26 mammals, 15 reptiles, 3 amphibians, and 61 insects, in addition to 7 species of marine crustaceans, 13 marine fish species and 10 fresh water fish species[307]. Many of these animal species are threatened with extinction. Indeed, there are no less than 46 endangered species inhabiting the San Juan River Wildlife Refuge, including the exceptionally rare manatee[308].

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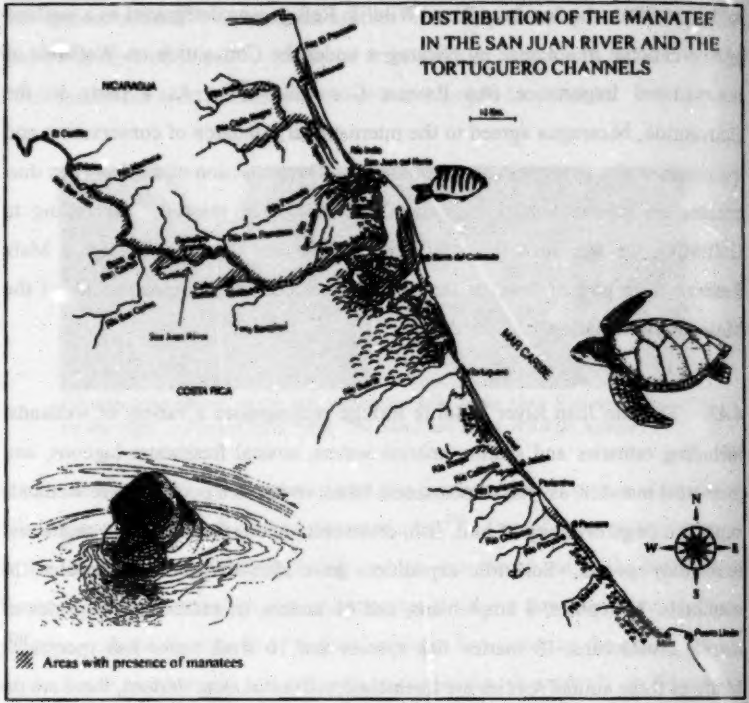
[305] *See* "Convention on wetlands of international importance especially as waterfowl habitat," concluded at Ramsar, Iran on 2 Feb. 1971. (United Nations, *Treaty Series*, Vol. 996, Reg. No. 14583, 17 Feb. 1976.)

[306] "The Annotated Ramsar List: Nicaragua". NR, Vol. II, Annex 44.

[307] *See* MARENA, *The San Juan River Wildlife Refuge Management Plan* (hereinafter "SJR Wildlife Refuge Management Plan"), 2005, p. 37. NR, Vol. II, Annex 40; *see also ibid.*, pp. 119-128 (Annex 1 of *ibid.*) for a table of the numerous animal species found in the San Juan River Wildlife Refuge.

[308] *See ibid.*, p. 39.


DISTRIBUTION OF THE MANATEE
IN THE SAN JUAN RIVER AND THE
TORTUGUERO CHANNELS
NICARAGUA
El Castillo
San Juan River
COSTA RICA
MAR CARIBE
San Juan del Norte
Tortuguero
Puerto Limón
N
W
E
S
▨ Areas with presence of manatees

Sketch Map 5: The Distribution of the Manatee in the San Juan River and Tortuguero Channels[309]

4.43. In addition to these animals, the San Juan River Wildlife Refuge conserves a variety of plants, including valuable trees, of which the red mangrove (*Rhizophora mangle*) and the yolillal (*Raphia taedigera*) are of particular importance. The full extent of the vast ecological wealth contained in the Refuge and the adjacent Indio Maíz Reserve remains to be discovered.

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[309] Jiménez Pérez, Ignacio. *The Manatees of the San Juan River and the Tortuguero Channels: Ecology and Conservation*. Managua. ARAUCARIA, 2000, p. 33, (hereinafter "The Manatees of the San Juan River"). NR, Vol. II, Annex 31.

(b) The San Juan River - Nicaragua Biosphere Reserve

4.44. In July 2003, UNESCO's Man and the Biosphere Programme designated the San Juan River Wildlife Refuge and the Indio Maíz Biological Reserve as part of the greater international biosphere reserve entitled the "San Juan River - Nicaragua Biosphere Reserve"[310]. This internationally recognized and supported biosphere covers 18,340 km^2, a full 14 percent of Nicaragua's national territory (the equivalent of half of the Netherlands)[311]. The Biosphere Reserve covers a wide variety of ecosystems, including tropical humid forests and wetlands, tidal marshes, coastal lagoons and estuaries, all of which are important shelters for rare or threatened animals and plant resources of the Meso-American tropics. In total, the Biosphere Reserve includes 19 natural ecosystems and is inhabited by 555 species, including 27 amphibians, 388 birds, and 60 mammals[312].

4.45. This comprehensive reserve system is built around several nucleus zones[313]. One of the principal zones is the Indio Maíz Biological Reserve. According to UNESCO, "the vast size of the biosphere reserve, in addition to its proximity to neighbouring Costa Rican protected areas, and as part of the Mesoamerican Biological Corridor, guarantee an adequate area for preserving genetic diversity, free mobility of species, breeding and maintenance of major species such as the jaguar or American tiger (*Felis onca*), the tapir (*Tapirus biardii*) and the red and green parrot (*Psittacideae*)"[314].

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[310] UNESCO MAB Biosphere Program Certificate, 15 Sept. 2003. NR, Vol. II, Annex 39.

[311] *See* "Indio Maíz Declared World Biosphere Reserve", (*La Prensa*, 10 July 2003). NR, Vol. II, Annex 24.

[312] *See* The Biological Stretch, *op. cit.*, p. 9 and 21: NR, Vol. II, Annex 41.

[313] *See* Strategic Program 2008, *op. cit.* NR, Vol. II, Annex 48.

2. *Regional and International Environmental Commitments*

4.46. Participation in the UNESCO Biosphere Program and the Ramsar Convention are only some of Nicaragua's international and regional commitments to protect and effectively manage the environment within and around the San Juan River. In 1977, Nicaragua ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[315]. The Convention obligates Nicaragua to regulate strictly the trade of threatened species found in her territory. Several of the species Nicaragua committed to protect are found in the San Juan River Biosphere Reserve including at least 42 bird, 36 mammal, 8 amphibian, and 18 reptile species[316].

4.47. In 1992, Nicaragua, together with five other Central American countries, including Costa Rica, signed the Convention for the Conservation of Biodiversity and Protection of the Priority Wildlife Areas in Central America[317]. The State parties emphasized that "the creation, management and strengthening of Protected Areas play a relevant role in ensuring sustainable development, reproduction of essential ecological processes and rural development"[318]. Both Nicaragua and Costa Rica also recognized that the "conservation of biodiversity in border habitats or bodies of water requires the will of all and external cooperation, regional and global, in addition to the efforts developed by our nations…"[319]. As such, both States obligated themselves to "ensure the adoption of measures that contribute to the conservation of natural habitats and their populations of natural species"[320].

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[314] *See* "Biosphere Reserve Information: Nicaragua: Río San Juan," UNESCO – MAB Biosphere Reserves Directory. NR, Vol. II, Annex 45.

[315] *See* Nicaragua, Agreement No. 5, 23 April 1977. NR, Vol. II, Annex 51; *see also* "List of Contracting Parties", Website of *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. Avialable at: http://www.cites.org/eng/disc/parties/chronolo.shtml.

[316] *See* Indio Maíz Management Plan, *op. cit.*, p. 58. NR, Vol. II, Annex 42; *see also* "CITES-listed animals: Nicaragua," *UNEP-WCMC Species Database: CITES-Listed Species*. Available at: http://www.unep-wcmc.org/isdb/CITES/Taxonomy/country_list.cfm/isdb/CITES/Taxonomy/country_list.cfm?displaylanguage=eng&Country=NI&submit=Go.

[317] *See* Convention for the Conservation of Biodiversity and Protection of the Priority Wildlife Areas in Central America, 5 June 1992. NR, Vol. II, Annex 2.

4.48. These agreements, of course, mean that Nicaragua is required to protect the environment in and surrounding the San Juan River not merely as a matter of municipal law but as a matter of international obligation as well. Indeed, under the agreements Costa Rica is obligated to protect the San Juan River and its environment from her side of the river. Nicaragua places a high priority on meeting these obligations. Costa Rica, apparently, does not. While Nicaragua has protected her entire side of the river by prohibiting human habitation and economic exploitation. Costa Rica has not. Very little remains of the vast forests on the right bank that once mirrored those on the left. Costa Rica has permitted the levelling of these fragile areas, and the destruction of their ecosystems to make way for large cattle ranches and grazing areas. Sketch Map 6 produced by Nicaragua's Ministry of Environment and Natural Resources, shows the areas adjacent to the San Juan River protected, respectively, by Nicaragua (to the north) and Costa Rica (to the south). While the entire Nicaraguan area north of the river is protected (as indicated by dark green or yellow-lined areas), there is relatively little protection on the south side.

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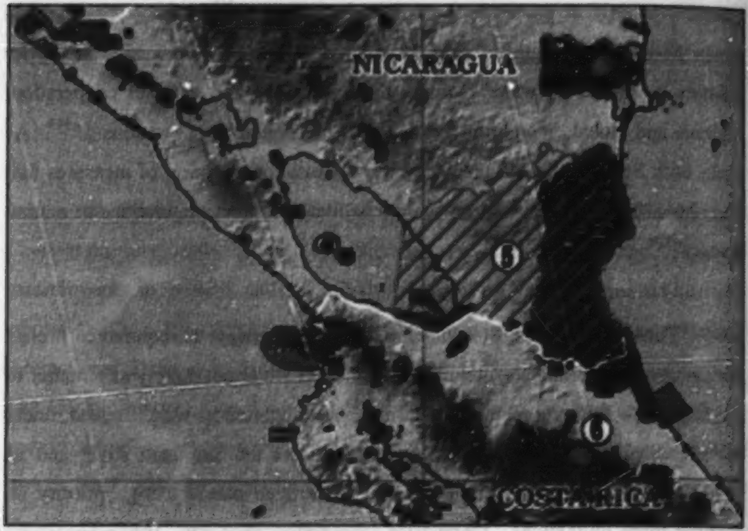
[318] *Ibid.*, Preamble.

[319] *Ibid.*, Art. 3.

[320] *Ibid*, Art 13(c).

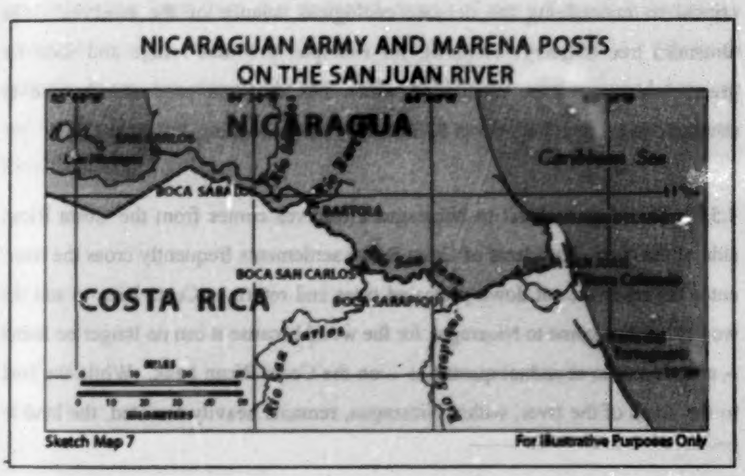


Sketch Map 6 For illustrative purposes only

3. *Management and Protection of the Reserves*

4.49. In order to implement Nicaragua's commitment to conserve the San Juan River Wildlife Refuge, the Indio Maíz Biological Reserve, and the greater San Juan River - Nicaragua Biosphere Reserve, the Nicaraguan Ministry of Environment and Natural Resources ("MARENA," by its Spanish acronym) has established seven posts along the left bank of the San Juan River, in addition to inland posts scattered throughout the Indio Maíz Reserve. These seven posts are located at San Carlos, Sábalos, Bartola, Boca de San Carlos, Sarapiquí, Delta, and San Juan de Nicaragua, the last four of which lie directly across the river from Costa Rican territory. Each post is manned by two rangers, who have responsibility for monitoring and controlling the areas surrounding that post[321]. In order to manage the region's natural resources, the MARENA rangers must monitor navigation along the San Juan.

4.50. The distance between the posts can be up to 40 kilometres, making the task of monitoring the reserves extraordinarily difficult. The challenge is compounded by the fact that poachers and other human predators who operate in the area are frequently armed. As a result, MARENA and the Nicaraguan Army have joined efforts to cooperate in the task of protecting these reserves[322]. For this reason MARENA and Army posts have been established adjacent to one another along the river, and MARENA rangers are joined by military officers in their patrols on the river and the adjoining land in the Nicaraguan reserves.


NICARAGUAN ARMY AND MARENA POSTS ON THE SAN JUAN RIVER

NICARAGUA
SAN CARLOS
COSTA RICA
Caribbean Sea
BOCA SABALOS
BARTOLA
BOCA SAN CARLOS
BOCA SARAPIQUI
Río San Juan
Río San Carlos
Río Sarapiquí
MILES
KILOMETERS

Sketch Map 7

For Illustrative Purposes Only

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[321] *See* Borges Affidavit, para 6. NR, Vol. II, Annex 67.

[322] *See* Inter-Institutional Convention for Environmental Conservation and the Sustainable Use of Natural Resources Signed Between the Ministry of the Environment and Natural Resources and the Sandinista People's Army, 29 March 1995. NR, Vol. II, Annex 3.

4. *Illegal Logging*

4.51. Illegal logging has been a constant problem both in the Indio Maíz Biological Reserve and in the San Juan River Wildlife Refuge. Both reserves are home to a wide variety of rare tree species, many of which are commercially prized for their aesthetics and durability. The rosewood tree (*Dalbergia retusa*), for instance, can be sold in the United States for up to US$ 40 per kilogram[323]. The caoba (*Swietenia macrophylla*) and cedro real (*Cedrela odorata*) -- two different species of mahogany -- the laurel (*Cordia alliodora*), the guanacaste (*Enterolobium shomburkii*), and the roble macuelizo (*Tabebuia rosea*) are also all in high demand, especially in Costa Rica, for the construction of fine furniture[324].

4.52. Apart from their natural beauty, these and other sought-after trees are critical to maintaining the delicate ecological balance of the reserves. The almendro tree (*Dipteryx oleifera*), for example, provides refuge and food for green macaws, the population of which has declined precipitously due to increased logging in both Costa Rica and, by illegal logging, Nicaragua[325].

4.53. The biggest threat to Nicaragua's reserves comes from the Costa Rican side of the river. Residents of Costa Rican settlements frequently cross the river, enter the reserves, cut down protected trees and return to Costa Rica to sell the wood[326]. They come to Nicaragua for the wood because it can no longer be found -- at least not in abundant quantities -- on the Costa Rican bank. While the land to the north of the river, within Nicaragua, remains heavily forested, the land to the south in Costa Rica has largely been cleared by Costa Rica's logging industry, increased human habitation, and the establishment of numerous cattle ranches. As stated in a recent international tourist guide book:

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[323] *See* The Biological Stretch, *op. cit.*, p. 30. NR, Vol. II, Annex 41.

[324] *Ibid.*

[325] *See* MARENA Ministerial Resolution 029-2006, para. IX. NR, Vol. II, Annex 57.

[326] *See* Borges Affidavit, para 7. NR, Vol. II, Annex 67.

> "You'll notice evidence of logging in the area, especially at the point where the Sarapiquí flows into the Río San Juan – the lumber industry has long had carte blanche in this area, due to the non-enforcement of existing anti-logging laws. The Nicaraguan side of the Río San Juan, part of the country's huge Indio Maíz Reserve, looks altogether wilder than its southern neighbor, with thick primary rainforest creeping right to the edge of the bank. Partly because of logging, and the residual destruction of its banks, the Río San Juan is silting up, have even shallow bottomed lanchas get stuck in the once consistently deep river."[327]

4.54. The Nicaraguan Army maintains records of poachers caught cutting trees or transporting logs from the protected areas. Some of these incidents, as contemporaneously recorded by the Army, are described in Annex 74. To cite an example, in one day alone – 26 May 1997 – 5,000 board feet of wood were cut and removed from Nicaragua's reserves, and transported across the river to Costa Rica[328].

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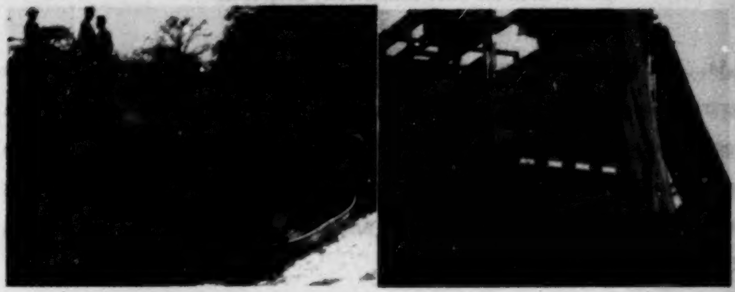
[327] McNeil, Jean. *The Rough Guide to Costa Rica*, Fourth Edition, 2005, p. 171. NR, Vol. II, Annex 34.

[328] *See* Affidavit of Lieutenant Colonel Walner Abraham Molina Pérez, 26 May 2008 (hereinafter "Molina Affidavit"), Annex 1 to Affidavit. NR, Vol. II, Annex 74.

Photograph Above: Aerial view of the San Juan River from the Nicaraguan side. The forested land in the foreground is Nicaraguan territory within the Indio Maiz Biological Reserve. The cleared land in the background is Costa Rican territory.



Photographs Above: Costa Rican residents found taking freshly cut planks of wood into Costa Rica on the San Juan River.

4.55. Illegal logging along the San Juan River is not a recent phenomenon, but has long been a serious problem. The evidence shows that Costa Rica has recognized this since as far back as 1869. On 28 April of that year, Costa Rica enacted a decree which, in its first article, prohibited the shipment through the San Juan River of lumber and other resources on her side of the river[329].

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[329] *See* Reply of Costa Rica, *op. cit.*, pp. 201-2. NR, Vol. II, Annex 6. *See also*, Chap. II, Sec. III above.

Unfortunately for Costa Rica, her efforts over the years to prevent illegal logging on her bank of the San Juan have not been sufficient, as evidenced by the fact that most of the once-forested land has been cleared. Especially in view of this, Nicaragua submits that she has every right to take reasonable measures to prevent the same thing from happening on her side. By designating the river itself and the entire length of its left bank an environmentally protected area, Nicaragua has been able to accomplish (thus far) what Costa Rica has not; until now, she has managed to preserve her forests, and the plant and animal species that inhabit them. But prevention of deforestation and protection of the environment are constant challenges, and require perpetual vigilance. No State should be more aware than Costa Rica of the risks and consequences of deforestation by illegal loggers and human settlers, since she has suffered the loss of her own forests at their hands. If any State should understand the need for Nicaragua's environmental regulations, it is Costa Rica.

5. *Illegal Hunting and Fishing*

4.56. Trees are not the only natural resource illegally extracted from the Nicaraguan reserves along the San Juan River, or from the river itself. Poachers, mostly originating from Costa Rican territory, illegally enter the reserves seeking other valuable plants and, especially, animals which are taken either for their meat or for sale as pets. Nicaraguan Army records include numerous apprehensions of poachers engaged in illegal hunting activities. Examples are provided in Annex 67. Local hunters have trained their sights especially on mammals like white tailed deer (*Odocoileus virginianus*), tapirs (*Tapirus bairdii*), pacas (*Agouti paca*), white lipped pecarries (*Tayassu pecari*), and collared peccaries (*Tayassu tajacu*)[330]. Marine turtles, iguanas, crocodiles and caimans are also frequent targets of poachers along the river.

4.57. An unfortunate but common weekend practice for some inhabitants of Costa Rica's riparian communities is to cross the river with hunting dogs to capture pacas, deer, sahinos, pavones, monkeys, parrots, macaws, or guatuzas, as well as other species that are on the verge of extinction[331]. Pacas and macaws have been sold on the Costa Rican market and hunted almost to extinction[332].

Paca *Deer* *Tapir* *Red Macaw*

4.58. Illegal fishing in the protected waters of the San Juan River is also common. Among the many fish species which live in the Refuge, several use the river as a migration route to reach Lake Nicaragua or Lake Caño Negro in Costa Rica where they procreate[333]. The more notable of these include the bull shark (*Carcharhinus leucas*), the tarpon (*Tarpon atlanticus*), the fat snook (*Centropomus parallelus*), and the tropical gar (*Centropomus parallelus*)[334]. As a result of illicit fishing in the San Juan River Wildlife Refuge, the populations of all these fish have significantly declined[335]. Some, like the shark, are close to extinction[336].

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[330] *See* "Costa Ricans Damage Flora in the San Juan River", (*La Prensa*, 13 June 1991). NR, Vol. II, Annex 15; *see also* The Manatees of the San Juan River, *op. cit.*, p. 51. NR, Vol. II, Annex 32.

[331] *See ibid.*; *see also* Borges Affidavit, para 9. NR, Vol. II, Annex 67.

[332] *See* "Costa Ricans Damage Flora in the San Juan River". NR, Vol. II, Annex 15.

[333] *See* The Biological Stretch, *op. cit.*, pp. 24-5. NR, Vol. II, Annex 41.

[334] *See* MARENA, "Species Under Threat of Extinction -- Biosphere Reserves: Indio Maiz and BOSAWAS" (hereinafter "MARENA Endangered Species List"). NR, Vol. II, Annex 46.

4.59. The river also hosts an array of shellfish species including the Caribbean Spiny Lobster (*Panulirus argus*)[337] and the large Big Claw River Shrimp (*Macrobrachium carcinus*)[338] and four species of Caribbean Prawn (*Penaeus spp*).[339] Costa Rican riparian residents illegally place traps in the water to capture these protected species in bulk for commercial sale[340]. Nicaraguan Army records reflect numerous incidents of illegal fishing or shrimping activities in or on the river. *See* Annex 74. For example, in one day, in a single location in the River Refuge, Army and MARENA personnel found and seized as many as 85 shrimp traps[341].

6. *Illegal Occupation of Protected Land*

4.60. With some frequency, families large and small, seeking land and dwelling space have crossed the river from Costa Rica in an effort to clear and settle on protected land in the San Juan River Wildlife Refuge and Indio Maíz Reserve. When detected, these incidents are duly recorded by the Nicaraguan Army. Annex 75 provides some examples, extracted from the Army's records. In 1996, for instance, in one night 72 people from Costa Rica occupied territory within the

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[335] *See* The Biological Stretch, *op. cit.*, p. 25. NR, Vol. II, Annex 41.

[336] *See* MARENA Endangered Species List, *op. cit.*, NR, Vol. II, Annex 46.

[337] *See* Indio Maíz Management Plan, *op. cit.*, p. 55. NR, Vol. II, Annex 42; *see also* SJR Wildlife Refuge Management Plan, *op. cit.*, p. 59. NR, Vol. II, Annex 40.

[338] *See* The Biological Stretch, *op. cit.*, p. 25. NR, Vol. II, Annex 41.

[339] *See* SJR Wildlife Refuge Management Plan, *op. cit.*, p. 59. NR, Vol. II, Annex 40.

[340] *See* Borges Affidavit, para 8. NR, Vol. II, Annex 67.

[341] *See* Molina Affidavit, Annex 1 to Affidavit. NR Vol. II, Annex 74.

Indio Maíz Biological Reserve, 5 kilometres from the Boca Sarapiquí border post[342]. Similar events have occurred repeatedly over the last decade. In 2006, 19 Costa Rican residents were found clearing land for occupation in the Reserve and prosecuted[343].

7. Nicaragua's Regulations Are Necessary To Protect the Environment

(a) The Requirement To Stop and Register

4.61. The regulations about which Costa Rica now complains are necessary to protect the environment and combat the aforementioned illegal activities in and around the San Juan River Wildlife Refuge. The requirement to stop and report at Nicaraguan military posts upon entry and exit is an obvious example. These very minimal and non-intrusive requirements, pursuant to which individuals must merely state their names and identify any passengers and cargo they are carrying, are crucial to monitoring activities on the river. This reporting provides Nicaraguan authorities with information on who enters the River Refuge, and in what areas, in order to ensure that the river is being used only for lawful purposes. In particular, the reporting allows Nicaragua to assure that all persons (including Nicaraguans) who enter the protected area also leave it, since no one is allowed to remain. As explained by a former Commander of Nicaragua's Southern Military Detachment:

> "When the vessel completed the San Juan River portion of its excursion, it stopped again at the Nicaraguan military post located at that point, at Delta, to register the tourists' departure and to assure that everyone who entered Nicaragua was exiting, and that

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[342] *See ibid.*

[343] *See* Public Prosecutor's Office of San Carlos, Río San Juan Province, "Criminal Complaint No. 000/06" (hereinafter "Criminal Complaint"), 21 December 2006. NR, Vol. II, Annex 43.

> none of them had been left behind in Nicaraguan territory. This was necessary as a security measure to assure that there were no unauthorized entries into the protected area of the Indio Maíz Biological Reserve."[344]

(b) The Requirement To Obtain a Departure Clearance Certificate

4.62. The requirement to obtain a departure clearance certificate serves a related function, and is crucial to protecting the river and surrounding reserves. To obtain a certificate, boatmen using the San Juan must permit an inspection of their vessels for purposes of, *inter alia,* ensuring that they are not carrying any plants or animals taken from Nicaragua's protected areas, including the river itself. The inspection also serves to assure that the vessel is not leaking or otherwise discharging fuel or other environmentally harmful substances into the river.

4.63. Costa Rica imposes similar requirements on vessels entering her rivers from the San Juan; they must stop at Costa Rican border posts to obtain a Costa Rican departure clearance certificate. Yet Costa Rica complains about her vessels having to stop at Nicaragua's border posts for the same purpose. Costa Rica alleges that Nicaragua's regulations violate her "related rights" under Article VI of the 1858 Treaty "to land indiscriminately on either side of the river, at the portion thereof where the navigation is common." To be precise, Costa Rica does not claim that Nicaragua has violated her right "to land" on the Nicaraguan side of the river, but she argues that the right "to land" necessarily implies a right "not to land," and that this implied and "related" right is the one that Nicaragua has violated by obliging Costa Rican vessels "to land" at the border posts.

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[344] Largaespada Affidavit, para 9. NR, Vol. II, Annex 72.

4.64. Besides the fact that Nicaragua's registration and departure clearance regulations are justifiable and reasonable exercises of her sovereignty over the river, it is far from clear that the right "to land" on the Nicaraguan side of the river has as a necessary corollary the right "not to land" on that bank. There is nothing in the 1858 Treaty that would prohibit Nicaragua from establishing border controls and check points, or from obliging Costa Rican vessels to stop there, to protect her legitimate sovereign interests. Nicaragua is sovereign in her own territory, and can, in this capacity, establish such limitations on activities conducted within her territory as are reasonable and protective of her legitimate sovereign interests. As has been established, the regulations here under discussion are fully justified by Nicaragua's interests in protecting the fragile and unique natural environment and, as discussed below, her interests in prevention of crime, navigational safety and security of the border. The regulations violate no rights – "related" or otherwise – of Costa Rica.

(c) *The Prohibition of Navigation at Night*

4.65. Navigation is prohibited on the San Juan after dark[345]. This applies to everyone, Nicaraguans as well as Costa Ricans. Beyond the obvious safety and security objectives achieved by this regulation (discussed below), it is also necessary for environmental protection. As testified by Nicaragua's military commanders, who are responsible for law enforcement and environmental protection on the river: "[I]t is during the night, when detection is most difficult, that the protected flora and fauna of the Indio Maíz Biological Reserve and the San Juan River are most vulnerable to poaching."[346] "[M]ost criminal activity and environmental depredation (including hunting and fishing for protected species in the Indio Maíz Biological Reserve and the San Juan River) took place at night."[347] Almost all incidents of illegal occupation of land inside the protected areas have also occurred at night, with individuals using the cover of darkness to move in and clear the trees around their camp as secretly and as quickly as possible[348].

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[345] *See* Action Plan, Art. 7. NR, Vol. II, Annex 48.

[346] Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

4.66. The prohibition on navigation at night cannot, of course, stop all environmental depredation within the San Juan River Wildlife Refuge and the Indio Maíz Reserve, but it makes such illegal activity more difficult, since any boat observed on the river at night prompts immediate attention and investigation.

(d) The Prohibition of Certain Fishing Activities

4.67. As discussed above, populations of certain fish, crustaceans, and aquatic mammals have dropped significantly over time due to the growth in human settlement on Costa Rica's side of the river, and the increased fishing in the San Juan River that has come with it. In order to conserve the fish and other animals which live in or migrate through the river, MARENA has prohibited commercial fishing or shrimping in the river, while allowing subsistence fishing by local Costa Rican residents, provided that they fish from the Costa Rican bank of the river[349]. Fishing from *within* the San Juan River Wildlife Refuge, whether on boats in the river or from the Nicaraguan shore is strictly prohibited[350]. The prohibition applies to everyone, including Nicaraguans. In the past, MARENA allowed some fishing in the refuge, but the regulations were tightened when it became clear that MARENA's tolerance was being abused by boatmen fishing commercially, and/or using fishing as a false cover for illegally entering the Indio Maíz Reserve[351]. By permitting local residents to fish for subsistence purposes from Costa Rica's bank of the river, while prohibiting all other forms of fishing in the river, Nicaragua has endeavoured to achieve a reasonable balance between environmental protection (in this case, protection of endangered fish, aquatic mammal, and crustacean species) and local human needs. In doing so, Nicaragua surely has not violated any rights of Costa Rica or her nationals.

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[347] Sánchez Affidavit, para. 6. NR, Vol. II, Annex 77.

[348] *See* Criminal Complaint, NR, Vol. II, Annex 43 ("On the seventeenth of December of two thousand and six, in the hours of the night, a group of persons originating from the sister Republic of Costa Rica entered our national territory through the sector of La Penca, armed with machetes, shovels, hoes, rakes, rope, hammocks, plastic or other articles or tools that were used by the accused…").

[349] *See* Largaespada Affidavit, para. 10. NR, Vol. II, Annex 72; *see also* Membreño Affidavit, para. 8. NR, Vol. II, Annex 73; *see also* Borges Affidavit, para 8. NR, Vol. II, Annex 67.

4.68. In her *Memorial*, Costa Rica claims a "customary right to fish in its waters for subsistence purposes for residents living on the Costa Rican bank of the San Juan"[352]. Nicaragua denies that such a right exists. Costa Rica certainly has not established its existence. It cannot be found in the Treaty of Limits or the Cleveland Award. Indeed there is neither an express or even a logical connection between this claimed right and the "right of free navigation...*con objetos de comercio,*" that is included in the 1858 Treaty of Limits, and upon which the *Application* in this case is based. In fact, there is no mention of any kind – explicit or implicit – of alleged fishing rights anywhere in the *Application*. In her *Reply*, Costa Rica makes no attempt to relate the so-called "customary right to fish" to the *Application*, to the Treaty of Limits, or to any navigational, or other rights thereunder. It is certainly not necessary to rule on Costa Rica's belated claim to customary fishing rights in order to decide the question of whether Costa Rica's navigation right has been violated. In these circumstances, Nicaragua considers that Costa Rica's attempt to expand her *Application* to cover an alleged "customary right to fish" is inadmissible under Article 40 of the Statute and Article 38, paragraph 2, of the Rules of Court. It is therefore only in the alternative that Nicaragua has answered Costa Rica's allegations concerning a "customary right to fish." It is difficult to understand what "customary rights" Costa Rica is referring to. There is no record of native population settlements in the area and none that were present in 1858. As that time there were no significant population centres or even known settlements along the river. This need to fish for subsistence, is new and due to the establishment of settlements on the Costa Rican bank of the river during the last decades. The novelty of this need is probably what caused Costa Rica to exclude this claim from her *Application.*

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[350] *See* Membreño Affidavit, para 8. NR, Vol. II, Annex 73 ("The only exceptions are two specifically designated sport fishing zones, one at San Juan del Norte and one on the upper portion of the river where both banks belong to Nicaragua, where licensed sport fishing under strict limitations is permitted during certain periods of the year").

[351] *See* Borges Affidavit, para 8. NR, Vol. II, Annex 67.

[352] CRM, para. 4.118 (3).

B. CONTROL AND PREVENTION OF CRIME

4.69. Illegal trafficking of drugs and arms on the San Juan is a problem. Nicaraguan military personnel are vigilant in their efforts to deter and prevent these activities, and have periodically captured smugglers using the river to transport their illicit cargoes[353]. A partial list of criminal apprehensions by the Nicaraguan Army on the San Juan River is set forth in Annex 74 to this *Rejoinder.*

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[353] *See* Molina Affidavit, Annex 1 to Affidavit. NR, Vol. II, Annex 74.

4.70. In addition to the need to control illicit drug and arms trafficking, the Nicaraguan military monitors traffic on the river to guard against all-too-common crimes like theft and assault along the river. There have been instances in which tourists visiting the area have been kidnapped. On 1 January 1996, for example, a group of German tourists was robbed by a gang of masked and heavily armed individuals, who then kidnapped two women seven kilometres from Boca San Carlos, where both Nicaragua and Costa Rica maintain security posts across the river from one and another[354].

1. The Requirement To Stop and Register

4.71. Nicaragua has required individuals travelling the river to stop and report themselves since before the 1960s. This requirement applies to everyone who navigates on the river – including Nicaraguans. To this day, it remains a fundamental element of Nicaraguan law enforcement efforts in the area. The requirement to stop and report at Nicaraguan military posts has an obvious deterrent effect on criminal activities of all kinds. Indeed, it is quite telling that Costa Rica herself has also deemed it necessary and appropriate to implement this same requirement on her own rivers connected to the San Juan since at least the 1960s[355]. The requirement to stop and register is particularly important to the prevention and detection of criminal activity due to the geography of the river. It winds its way through remote, heavily vegetated (on the Nicaraguan side), sparsely populated (on the Costa Rican side) territory for more than 220 km. Nicaragua's Army posts are spread out from one another, leaving vast stretches of the river far removed from law enforcement officials. Only by keeping track of vessels as they enter and leave the river can Nicaraguan authorities effectively monitor them to assure they do not engage in unlawful activities.

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[354] *See* "Tourist and Guide Kidnapped", (*La Nación*, 3 January 1996). NR, Vol. II, Annex 16.

[355] *See* Aburto Affidavit, para 3. NR, Vol. II, Annex 65.

2. *The Requirement To Obtain a Departure Clearance Certificate*

4.72. The need for each boat – regardless of nationality – to secure a departure clearance certificate also ensures that the individuals navigating on the river are not carrying illicit cargo. To obtain a certificate, a vessel must be inspected, *inter alia*, to assure it is not transporting prohibited items. Nicaragua established the requirement to secure a departure clearance certificate at least fifty years ago. Costa Rica has had a similar requirement for navigation on her rivers -- tributaries of the San Juan -- for at least forty years (as shown by her own evidence)[356].

4.73. As stated by Captain Mario García Lopez, responsible for supervising several of the Nicaraguan Army's monitoring posts along the San Juan River:

> "[B]oats are required to obtain Nicaraguan departure clearance certificates before they may navigate on the San Juan River. This includes boats operated by Nicaraguans….All boats must also identify their passengers and any cargo that they are carrying. This is a security measure designed to ensure that there is no illegal trafficking of persons or goods on the river, and to ensure that no one who enters and exits the river has entered the Indio Maíz Biological Reserve, located on the northern bank of the river's course, where access is not allowed."[357]

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[356] *See* "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard. CRR, Vol. II, Annex 65(b); *see also* Aburto Affidavit, para 3. NR, Vol. II, Annex 66; *see also* Membreño Affidavit, para 4. NR, Vol. II, Annex 73.

[357] *See* Affidavit of Captain Mario García López, 9 March 2008 (hereinafter "García Affidavit"), para. 4. NR, Vol. II, Annex 70.

4.74. The measure does not materially burden commercial boatmen who use the river. As attested by a boatman who transports commercial goods on the river on a weekly basis, "I am not aware of any occasions when any of the Costa Rican boatmen who navigate the river taking goods either to Nicaragua or Costa Rica have been prevented from completing their trip, by Nicaraguan authorities posted along their routes."[358] Nor does the departure clearance certificate impose hardships on local Costa Rican residents. Nicaragua provides departure clearance certificates to local residents -- i.e. Costa Ricans who live on the right bank of the river -- as a courtesy and at no cost. These certificates are valid for one month, and are permanently renewable, without need for inspection of the local resident's vessel.[359]

4.75. Despite her pretensions to the contrary in these proceedings, Costa Rica has expressly agreed that, for law enforcement purposes, and especially to combat drug trafficking, Nicaragua should enforce her requirement that all vessels navigating on the San Juan obtain a departure clearance certificate, and report their presence at all Nicaraguan Army posts passed during the voyage. This agreement is reflected in the Final Minutes of the Fourth Binational Nicaragua-Costa Rica Meeting, held on 12 and 13 May 1997[360]. The Final Minutes, which were signed by Foreign Minister Emilio Alvarez Montalván of Nicaragua and Foreign Minister Fernando Naranjo Villalobos of Costa Rica, cover a variety of matters agreed to at the Meeting. On the subject of Drug Trafficking, the Final Minutes reflect the following agreement:

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[358] Acevedo Affidavit, para. 4. NR, Vol. II, Annex 66; *see also* NR, para. 4.89.

[359] *See* Sánchez Affidavit, para. 6. NR, Vol. II, Annex 77; *see also* Membreño Affidavit, para. 5. NR, Vol. II, Annex 73; Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72; García Affidavit, paras. 6-7. NR, Vol. II, Annex 70; Talavera Affidavit, para. 8. NR, Vol. II, Annex 78.

[360] Final Minutes from the IV Nicaragua-Costa Rica Binational Meeting. NR, Vol. II, Annex 4.

> "Regarding the problem raised by the Costa Rican delegation about the existence of places that require the presence of authorities competent on this subject, it was agreed that Nicaragua will carry out efforts directed toward establishing posts in specific locations, to broaden the coverage in the fight against this crime.
>
> (...)
>
> In relation to the flow of vessels it was considered necessary that these boats navigate duly registered by the posts that issue the corresponding certificates of navigation, as applicable, the posts of San Juan del Norte, San Carlos and Sarapiquí."[361]

4.76. Having recognized and accepted the necessity of these Nicaraguan regulations, and having agreed to their enforcement in 1997, Costa Rica's sudden change of heart -- and newfound theory that they constitute a violation of her rights under the 1858 Treaty -- are indefensible and should be disregarded.

3. *The Prohibition of Navigation at Night*

4.77. Much like poachers who use darkness to their advantage, traffickers in arms, drugs, and human beings also prefer the cover of night when it is easier to navigate the river without detection. By prohibiting nighttime navigation, Nicaragua is able to better prevent these illicit activities. Customary traffic by local residents, commercial boatmen, or tourist boats normally occurs during daytime hours. As stated by a local resident who was a commercial boatman on the river in the 1960s and continues to use the river today: "It was rare for a boat to navigate at night. Local residents and other boatmen made their trips during

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[361] *Ibid* (emphasis added).

the day, and only used the river at night in cases of emergency."[362] Nicaragua continues to permit navigation at night in cases of emergency.[363]

C. NAVIGATIONAL SAFETY

4.78. As dominion and supreme control (*sumo imperio*) over the San Juan River are entrusted to one State – Nicaragua – it is she who bears responsibility for ensuring the safety of navigation on the river.

4.79. The river poses a wide array of hazards, including the many, shifting sandbars that characterize its lower reaches, the presence of fallen trees throughout its course, and alligators that lurk in its waters. As one might expect, the boats that travel the river are in various states of repair, and some are not in a condition to operate safely. Accidents, drownings and even animal attacks are not uncommon. Navigation at night is particularly dangerous[364].

1. *The Requirement to Stop and Register*

4.80. The requirement to stop and register at Nicaraguan posts ensures that all passengers are accounted for on each leg of the journey on the San Juan. Costa Rica's statement that the Nicaraguan Army officers at the post require school children passing the post to stop and report daily is true[365]. In addition to the

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[362] Aburto Affidavit, para. 5. NR, Vol. II, Annex 65.

[363] *See* Membreño Affidavit, para. 9. NR, Vol. II, 73; *see also* Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72.

[364] *See* Talavera Affidavit, para 8. NR, Vol. II, Annex 78; *see also* Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

[365] *See* CRR, para. 4.48.

possibility of children (or anybody else) falling overboard and drowning, several children have been attacked by crocodiles in the San Juan and its adjoining inlets. Within the past year, a 4-year-old boy and a 13-year-old boy were killed by crocodiles[366]. The river is especially hazardous for children, who sometimes pilot their own small craft, and Nicaraguan officials are particularly vigilant in protecting them against the fate of those who have already lost their lives on the river.

2. *The Requirement To Obtain a Departure Clearance Certificate*

4.81. The requirement to obtain a departure clearance certificate helps ensure that the boats navigating the river are seaworthy and capable of safe operation. As previously stated, the vessels used on the San Juan River are in various states of repair -- and disrepair. As testified by Captain Mario Garcia Lopez, all boats are required to stop at the Nicaraguan post at their point of entry onto the San Juan River. "The departure clearance certificate certifies that the boat has been inspected, and that it meets all Nicaraguan safety requirements for navigation on the river"[367]. To secure a departure clearance certificate, boat owners must present operators' licenses and relevant information about the vessel. These minimal steps are reasonable and necessary to make traffic on the San Juan as safe as possible, which is Nicaragua's sovereign right and responsibility.

4.82. Searches of vessels, which are carried out as part of the departure clearance process, also serve the interests of safety. As testified by Colonel

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[366] *See* "Crocodile Devours Child in the Indio River", (*La Prensa*, 10 April 2007). NR, Vol. II, Annex 25; *see also* "Crocodile kills 13-year old boy who was bathing in the river", (*La Nación*, 5 May 2007). NR, Vol. II, Annex 26.

[367] García Affidavit, para. 4. NR, Vol. II, Annex 70.

Ricardo Sánchez, a former Commander of the Southern Military Detachment: "For safety reasons, all tourist boats (including those operated by Nicaragua from El Castillo or San Juan del Norte) had to stop at the army post closest to their point of entry onto the river and submit to a safety inspection, which included a determination that the vessel was not carrying any weapons, explosives or other flammable materials."[368] The treatment is the same for Nicaraguans as well as Costa Ricans[369].

3. *The Prohibition of Navigation at Night*

4.83. As discussed, navigation of the river can be dangerous; navigation at night is much more so. As anyone personally familiar with the river can attest, once the sun sets darkness envelopes the river very quickly. At best, the unaided eye can see ahead only a few metres making it nearly impossible to detect the many obstacles on the river[370]. Very few of the boats on the river have navigation lights, which means not only that they cannot see the water in front of them but also that other boats cannot see them, increasing risks of nighttime collision[371]. Nocturnal navigation is particularly dangerous in the dry season, when the waters of the river are shallow, and sand bars make much of the river close to impassable. If one cannot see the movement of the current, it is extremely difficult to find the navigable paths in the water and avoid the sand bars.

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[368] Sánchez Affidavit, para 7. NR, Vol. II, Annex 77.

[369] *See* Membreño Affidavit, para 9. NR, Vol. II, Annex 73; *see also* Acevedo Affidavit, para 3. NR, Vol. II, Annex 66.

[370] *See* Largaespada Affidavit, para. 3. NR, Vol. II, Annex 72; *see also* Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

[371] *Ibid.*

4.84. The point is emphasized by Brigadier General Membreño, Commander of the Southern Military Detachment between 1992 and 1995:

> "[N]avigation is not permitted after dark. This prohibition applies to everyone, Nicaraguans included. The river is treacherous to navigate at night, since there are no lights, and fallen logs and sand bars, invisible in the dark, are prevalent, as are crocodiles. By longstanding custom nighttime navigation of the river has not been practiced, except in emergency situations. Nicaragua authorizes such emergency use of the river at night. Otherwise, it is prohibited mainly for safety reasons."[372]

Photographs Above: The photographs above were taken on the San Juan River at 5:40, 6:06, and 6:20 in March, 2008.

4.85. Nowhere in her written pleadings does Costa Rica deny that navigation on the San Juan River is difficult and dangerous, and even more dangerous at night. In fact, Costa Rica has long recognized that navigation on the river is fraught with risks. As she explained to President Cleveland in 1887: "…it is well known that the navigation of the San Juan River encounters many obstacles, not only on account of the shallowness at certain places, but also owing to its rapids and other dangers"[373]. The natural "obstacles" cited by Costa Rica – shallowness and rapids, both rendering the river impassable in places – have not disappeared in the past 120 years. Nor have the crocodiles. Nor has the darkness that descends at night become any more penetrable. These facts are well known to Costa Rica, making it disingenuous for her to challenge Nicaragua's promotion of navigational safety, and the protection of human lives, by prohibiting navigation on the river after dark, except in emergencies.

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[372] *See* Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72; *see also* Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

[373] Argument of Costa Rica, *op. cit.*, pp. 160-161. NR, Vol. II, Annex 5.

D. BORDER PROTECTION AND SECURITY

4.86. It is undisputed that the San Juan River is part of Nicaragua's sovereign territory. To enter the river from Costa Rica is to cross an international border and enter Nicaragua herself. As does every sovereign State, Nicaragua maintains certain requirements to regulate entry into her territory.

1. *Immigration Controls*

4.87. Nicaraguan immigration officials at the border posts along the San Juan River follow the same procedures that are followed at all other border entry points. Just as all non-nationals are required to obtain a tourist card when entering Nicaragua at the Managua International Airport, or at other points of entry, so too when they enter Nicaragua via the San Juan. Contrary to Costa Rica's assertions that this policy began only in the mid-1990s, it was actually established as early as 1979, if not earlier, under Decree No. 161[374]. The decree required all foreign travellers to secure a special tourist card when entering Nicaraguan territory. The cost of the tourist card has varied over time. The current cost is US$ 5[375]. The requirement is the same for all non-Nicaraguan nationals, regardless of their country of origin. Many States impose similar requirements, or charge higher fees[376].

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[374] *See* Nicaragua, Decree No. 161, 14 Nov. 1979. NR, Vol. II, Annex 52.

[375] *See* Nicaragua, Law No. 495: General Tourism Law, 2 July 2004, Art. 21(e). NR, Vol. II, Annex 55; *see also* Nicaragua, Register No. 3743. NR, Vol. II, Annex 53.

4.88. Nicaragua makes an exception for residents of Costa Rican riparian communities, who are treated like Nicaraguans insofar as their navigation on the San Juan is concerned[377]. In fact, as testified by Franklin Ponce Ortiz, Immigration Dispatch Inspector for San Juan River Province: "[I]mmigration authorities on the river do not regulate the local residents. River residents, for their own safety and for the security of the territory, are simply required to register with the military officials when they pass a military post"[378]. According to Army Captain Mario García Lopéz, Chief of the Second Border Sector of the San Juan River:

> "Nicaragua does not require the Costa Rican residents along the river to have their boats inspected, or to pay a fee for a departure clearance certificate, or to register with Nicaraguan immigration, or to have a consular visa when they navigate on the San Juan River. If a resident passes a military post, he is required to simply notify the post of his passage. All local residents are provided a courtesy departure certificate for their regular use of the river, which is valid for one month and is permanently renewable."[379]

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[376] *See, e.g.*, United States Department of State, "Fees for Visa Services," available at: http://travel.state.gov/visa/temp/types/types_1263.html; *see also* Dutch Ministry of Foreign Affairs, "Applying for a visa," available at: http://www.minbuza.nl/en/welcome/comingtoNL, visas_x_consular_services/applying_for_a_visa.html; *see also* Ministry of Foreign Relations of Colombia, "Procedural information for visas," available at: http://www.cancilleria.gov.co/Web ContentManager/webapp/display.jsp?sid=22501&pid=16936&Op=1; *see also* Ministry of Foreign Relations of the Republic of El Salvador, "Types of Visas CA4," available at http://www.rree.gob.sv/sitio/sitiowebrree.nsf/pages/svisas_tiposca4.

[377] *See* Talavera Affidavit, para. 8. NR, Vol. II, Annex 78; *see also* García Affidavit, para. 4. NR, Vol. II, Annex 70, *see also* Membreño Affidavit, para 9. NR, Vol. II, Annex 73.

[378] Affidavit of Franklin Ponce Ortiz, 7 March 2008 (hereinafter "Ponce Affidavit"), para. 4. NR, Vol. II, Annex 76.

[379] García Affidavit, para. 6. NR, Vol. II, Annex 70.

4.89. Likewise, Nicaragua presently exempts from her immigration regulations and procedures the Costa Rican merchants who regularly use the river to transport goods from one community to another, since they are also local residents who are exempt from immigration requirements on that basis. During the last ten years, there have been approximately four Costa Rican boatmen regularly transporting goods on the river[380]. One transports and sells boat fuel from Puerto Viejo de Sarapiquí to local boat operators. Another owns a small "mom and pop" grocery store in La Tigra, on the Costa Rican bank, and uses the river to resupply his wares[381]. There are two other Costa Rican boatmen who ship shellfish from San Juan del Norte, Nicaragua to Puerto Lindo, Costa Rica[382]. None of these Costa Rican commercial boatmen is required to secure a tourist card, to obtain a Nicaraguan visa, or to pay for a departure clearance certificate[383].

4.90. In addition to the tourist cards, which Nicaragua requires of all non-nationals (except as indicated above), entry into Nicaragua also requires a valid visa, depending on the country of origin. Local Costa Rican residents and commercial boatmen are exempt from the visa requirement, as well as the tourist card requirement. Notably, the entry visa requirement affects very few of the foreign tourists who enter Nicaragua via the San Juan River, including the tourists who enter in Costa Rican tourism boats. Nicaragua requires entry visas for the nationals of only a very small number of States who frequent the river[384]. As testified by Colonel Sánchez, who commanded the Southern Military Detachment from 2002 to 2007: "Very rarely were [tourists] required to show a Nicaraguan visa, because Nicaragua does not require tourists from North America, member countries of the European Union, Canada or Australia to obtain visas, and almost all of the tourists on these vessels were from those countries, with very few exceptions."[385] Costa Rica has not demonstrated that the tourist card or visa requirements have discouraged tourists from coming to the San Juan. Indeed, she has provided no evidence whatsoever to support this claim. Nicaragua's evidence thoroughly refutes it. As shown earlier in at paragraph 4.33 and the accompanying table, Costa Rican tourism to the San Juan actually experienced a substantial growth between 1998 and 2004, while these Nicaraguan immigration measures were in effect. Thus, in contrast to the unsupported claims made by Costa Rica that Nicaragua's immigration requirements have "practically destroyed" tourism to the San Juan[386], tourism on Costa Rican vessels has quite obviously continued to flourish.

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[380] *See* Acevedo Affidavit, para 2. NR, Vol. II, Annex 66; *see also* García Affidavit, para. 3. NR, Vol. II, Annex 70.

[381] *See* García Affidavit, para. 7. NR, Vol. II, Annex 70.

[382] *See* Acevedo Affidavit, para 2. NR, Vol. II, Annex 66.

[383] *See* García Affidavit, para. 4. NR, Vol. II, Annex 70.

4.91. With the exception of residents of local settlements and commercial boatmen, Nicaragua requires Costa Rican nationals to have an entry visa to enter Nicaragua. The requirement that non-local Costa Ricans have a consular visa to enter Nicaragua is based on reciprocity. Costa Rica requires an entry visa from all Nicaraguan travellers entering Costa Rica.

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[384] *See* Nicaragua, Decree No. 57-2005, 31 August 2005. NR, Vol. II, Annex 56. Decree No. 57-2005 delineated three immigration categories. The majority of States whose nationals visit Nicaragua are listed under Category A.

[385] Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

[386] CRR, para. 4.12(iii).

2. *The Requirement To Fly the Nicaraguan Flag*

4.92. Nicaragua has required certain larger vessels to fly the Nicaraguan flag while navigating on the San Juan River. The requirement has only been applied to those vessels that have masts or turrets at the stern[387]. This excludes local residents and commercial traders who generally travel in small wooden *pangas* (simple rudimentary boats, generally with a single outboard motor) which lack the means to display flags. According to Colonel Ricardo Sanchez, a former military Commander for the region: "In practice, this meant only that the Costa Rican tour boats kept a Nicaraguan flag on board, and hoisted it during the time they were on the San Juan"[388]. The inconvenience imposed on Costa Rican boats is therefore trivial. The requirement is known by all boat operators who use the river, and has never impeded navigation. Costa Rica has not identified a single incident in which Nicaraguan authorities prevented a Costa Rican vessel from navigation on the San Juan because of failure or refusal to display a Nicaraguan flag.

4.93. The requirement to fly her flag during navigation on her waters, including the San Juan, is an attribute of Nicaragua's sovereignty, and is a matter of international custom and practice. Nicaragua permits foreign vessels to fly their flags of registry while navigating on the San Juan, as well as the Nicaraguan flag. Thus, Costa Rican vessels may and do fly the Costa Rican flag, as well as that of Nicaragua. Flying the latter is a gesture of respect for the sovereignty of the host State. Nicaragua finds it disturbing that Costa Rica's objects to this reasonable and non-burdensome requirement. It is emblematic of Costa Rica's repeated efforts, since 1998, to expand her "rights" on the San Juan at Nicaragua's expense. Particularly troubling are Costa Rican attempts, through her government-supported tourism promotion efforts, to depict the San Juan River as part of Costa Rica. In 1999, for example, the Nicaraguan Minister of Tourism protested that a Costa Rican travel agency was promoting its San Juan River tours with a map depicting the river as belonging to Costa Rica[389].

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[387] *See* Action Plan, *op. cit.*, Art. 6. NR, Vol. II, Annex 48,

[388] Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

4.94. Costa Rica's *Application* makes no reference to Nicaragua's requirement that all foreign vessels fly the Nicaraguan flag (as well as their own) while navigating on the San Juan. The *Application* makes no claim that this is a violation of her rights, let alone of her right of navigation under the Treaty of Limits. Rather, the claim post-dates the *Application*, and is styled by the Applicant State as a form of harassment that Nicaragua invented to punish Costa Rica for bringing this case to the Court. Nicaragua rejects this suggestion, as well as Costa Rica's implication of bad faith on her part. In fact, Nicaragua's flag requirement has deep historic roots, of which Costa Rica cannot help but be aware. In her pleadings to President Cleveland in 1887, Costa Rica referred approvingly to a note of protest that Nicaragua sent to the Government of the United States of America in Washington, dated 7 October 1863. In this note, Nicaragua protested that the flag of the United States had been used while navigating on the San Juan, declaring that: "Nicaragua does not feel disposed to consent that any other flag, *except her own and that of Costa Rica*, as a bordering state, should float in the navigation of her interior waters"[390]. As Costa Rica's own pleadings to the Arbitrator acknowledge, since at least 1863, shortly after the Treaty of Limits was executed, Nicaragua has considered it inherent in her sovereign rights over her own "interior waters," including the San Juan River, to decide whose flag may fly on vessels navigating in those waters, and she has carefully indicated that hers *together with* Costa Rica's (not that of Costa Rica alone) could be flown over the San Juan.

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[389] *See* "Another Costa Rican Map 'Takes the River'", (*El Nuevo Diario*, 26 August 1999). NR, Vol. II, Annex 23; *see also* Letter from Eduardo Montealegre, Foreign Minister of Nicaragua, to Lorenzo Guerrero, Director of the Nicaraguan Institute of Tourism, 1 September 1999 and Email from Alfredo Ferreti Lugo, Secretary General of the Nicaraguan Institute of Tourism, to Caño Blanco Marina, 13 September 1999. NR, Vol. II, Annex 14.

[390] Argument of Costa Rica, *op. cit.*, p. 251. NR, Vol. II, Annex 5 (emphasis added).

4.95. Costa Rica contends in the *Reply* that the comparison in the *Counter-Memorial* between the rules of the law of the sea and those governing river navigation is "extravagant"[391]. But why so? To the contrary, it is both reasonable and appropriate to assimilate navigation on a river, over which a State is acknowledged to have exclusive dominion and supreme control (*summo imperio*), with internal waters or territorial seas. As the Court recalled in its 1986 *Judgment* in *Nicaragua v. United States of America*:

> "The basic legal concepts of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space about its territory. [...T]he 1944 Chicago Convention on International Civil Aviation ... in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the Unites Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law."[392]

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[391] CRR, p. 81, para. 3.107.

[392] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), merits*, judgment of 27 June 1986, *ICJ Reports* 1986, p. 111, para. 212.

Clearly the same holds true regarding rivers in which a riparian has exclusive jurisdiction and sovereignty – as is the case of Nicaragua and the San Juan, as explicitly provided in Article VI of the 1858 Treaty of Limits.

4.96. In sum, by requesting foreign States – including Costa Rica – to fly her own flag, together with theirs, Nicaragua is merely exercising her sovereignty over the river, without by any means impeding navigation. Nicaragua's flag requirement violates no rights of Costa Rica.

Conclusion

4.97. Each and every one of the regulations with which Costa Rica takes issue is expressly designed and implemented to protect Nicaragua's legitimate sovereign interests. They have also been crafted to avoid imposing any significant or unreasonable burdens on Costa Rica or her nationals; and in fact, no material burdens have been imposed. The regulations protect not only Nicaragua but also the people who enter the river expecting a safe journey, the local residents who desire a secure neighbourhood, and the members of the international community who place great value on conserving the river's rich biological diversity for future generations. As shown:

a. The requirement that all persons navigating on the river report to Nicaraguan border posts is a reasonable measure to protect the environment, prevent criminal activity, and ensure navigational safety;

b. The requirement that all vessels obtain a departure clearance certificate is also a reasonable measure to protect the environment, prevent criminal activity and secure navigational safety;

c. The prohibition of navigation at night (except in emergencies) is a reasonable measure to protect the environment, prevent criminal activity, and secure navigational safety;

d. The prohibition on fishing from boats on the river is a reasonable measure to protect the environment;

e. The requirement that persons entering the river undergo immigration processing is a reasonable measure to protect Nicaragua's borders and her sovereignty; and

f. The requirement that vessels of a certain size fly the Nicaraguan flag -- as well as their flag of registry -- is a reasonable measure to manifest and protect Nicaragua's sovereignty over the river.

4.98. Nicaragua takes her obligation to safeguard the river, its users and residents, and its environment seriously and has designed her regulations to meet this responsibility. That Costa Rica wishes to sidestep these regulations because she finds them somehow inconvenient, or inconsistent with her own pretensions to extend her "rights" over the river, is clear. However, Costa Rica's desire to exempt herself from these basic environmental, security, safety and border protection measures cannot diminish Nicaragua's right, as the exclusive sovereign power, to reasonably regulate navigation on the San Juan River.

CHAPTER V:

COSTA RICA'S ALLEGED RIGHTS OF PROTECTION, CUSTODY AND DEFENCE OF THE SAN JUAN RIVER

Introduction

5.1. Through the vehicle of this case, Costa Rica seeks to expand her rights under the 1858 Treaty, as interpreted in the 1888 Cleveland Award, to an extent that would negate Nicaragua's "exclusive dominion and supreme control (*sumo imperio*) over the waters of the San Juan river" for all practical purposes[393]. Her *Reply* provides further proof of Costa Rica's refusal to accept that this waterway is wholly within Nicaraguan territory, and therefore under Nicaragua's sovereignty.

5.2. Thus, Costa Rica continues to base rights on the shifting sands of non-binding documents and inapposite cases, and to conjure rights from provisions of the 1858 Treaty and the Cleveland Award that grant no such rights at all.

5.3. By claiming this broad array of rights on the San Juan River, Costa Rica effectively claims shared sovereignty over the river. Since a direct and open claim to this effect would be precluded by the 1858 Treaty[394], Costa Rica seeks to attain her objective through a multiplicity of lesser, yet still quite significant, claims – a "death by a thousand cuts" strategy that she evidently believes will enable her to attain her goal.

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[393] "Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 April 1858", in *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua*, Washington: Gibson Bros., 1887, Document No. 1, Article VI (hereinafter "1858 Treaty (English version submitted to President Cleveland by Costa Rica)"). CRM, Vol. II, Annex 7(b), p. 50.

[394] *See ibid.*

5.4. She should not be permitted to do so. Giving effect to Costa Rica's claimed rights of protection, custody and defence would render entirely illusory the *quid pro quo* embodied in the 1858 Treaty, which as shown in Chapter II, Section I, legitimized the annexation by Costa Rica in 1824 of the large district of Nicoya (Guanacaste) in return for recognition of Nicaragua's exclusive sovereignty over the San Juan River. More fundamentally, validation of these claims would negate Nicaragua's sovereignty over the river, treating it as if the boundary followed the median line rather than the right bank. The injustice of such a result is obvious, but Costa Rica nevertheless continues to seek it, or its functional equivalent.

5.5. This chapter will show that, as to the scope of the rights claimed by Costa Rica to use the San Juan River, the *Reply* fails to rebut Nicaragua's *Counter-Memorial*. In particular, it will be shown that Costa Rica has no right to perform police functions on the San Juan River, or to navigate the river with vessels of her public security forces except to the limited extent recognized in the Cleveland Award: with vessels of her revenue service, when (and only when) such navigation is necessary to protect her right to navigate "*con objetos de comercio.*" The chapter will also demonstrate that Costa Rica has never sought to exercise this right, and that, in any event, Nicaragua has never denied or breached it.

Section I. The Scope of Costa Rica's Alleged Rights

A. COSTA RICA'S ALLEGED RIGHTS HAVE NO BASIS IN WHAT SHE CHARACTERIZES AS THE "APPLICABLE LAW"

5.6. Costa Rica recites a litany of authorities under the heading, "Applicable Law" -- the same sources she referred to in her *Memorial* in this regard -- in her effort to establish "public rights of protection, custody and defence." These sources are no more availing for Costa Rica than they were when first cited; Costa Rica fails to refute Nicaragua's challenges to them.

1. *Article IV of the Treaty of Limits*

5.7. Costa Rica first alleges that her "public rights of protection, custody and defence are established in Article IV of the Treaty of Limits," and that "[t]hese rights have implications for Costa Rica's navigation on the San Juan"[395]. That Article -- whose actual text, perhaps understandably, Costa Rica does not quote in the *Reply* to substantiate the above contentions -- for the most part lays down obligations, not "rights" as they are characterized by Costa Rica. It provides as follows:

> "Article IV.
>
> The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and, therefore, both the advantages of their use and the obligation to contribute to their defence shall also be common. Costa Rica shall be bound, as far as the portion of the banks of the San Juan river which correspond to it is concerned, to contribute to its custody in the same way as the two Republics shall contribute to the defence of the river in case of external aggression; and this they shall do with all the efficiency within their reach."[396]

5.8. Article IV is straightforward. It begins by addressing the bays at the Atlantic (Caribbean) and Pacific ends of the border between the two countries. It provides that since both bays are "common" to the two States,[397] each has rights ("advantages of their use") and duties ("the obligation to contribute to their defence") in respect of the bays. The Article then goes on to address the portion of the San Juan River where the right bank forms the boundary. It provides that Costa Rica has two obligations regarding this portion of the river. First, she has an obligation to contribute to the custody of the river "as far as the portion of the banks of the San Juan river which correspond to it is concerned.[398]" Second, she has an obligation, with Nicaragua, to "contribute to the defence of the river in case of external aggression."

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[395] CRR, para. 3.79.

[396] 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

5.9. Costa Rica seeks to make these very limited rights and obligations the basis of greatly expanded rights of navigation on the San Juan River with vessels of her public security forces. As made clear in the *Counter-Memorial*[399], such rights would be incompatible not only with Nicaragua's sovereignty over the San Juan, but also with President Cleveland's decision that Costa Rica has no right to navigate on the river with vessels of war, and that only vessels of Costa Rica's revenue service may use the river, and only then when necessary to protect the right to navigate "*con objetos de comercio*."

5.10. Contrary to Costa Rica's inflated contentions, the ordinary meaning of the terms of Article IV, in their context and in the light of the Treaty's main object and purpose (the establishment of a boundary), is that while Costa Rica may defend the two bays using vessels – since "the advantages of their use and the obligation to contribute to their defence [are] common" and the Bay of San Juan in 1858 was accessible by sea – she may discharge her obligations to contribute to the river's custody ("*guarda*") and defence only from her own banks, and only "in case of external aggression."

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[397] The question is presently not at issue before the Court, but the extent of the "common" nature of the Bay of San Juan was limited by the Cleveland Award and it was left in the delimitation executed by the Alexander Awards totally within Nicaraguan territory. The other "common" Bay of Salinas was partially delimited by the Alexander Awards. When the term "common" bays is used in these pleadings by Nicaragua, it is in this special sense.

[398] 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

[399] *See* NCM, paras. 4.2.28-4.2.35.

5.11. As noted in the *Counter-Memorial*[400], this interpretation is confirmed by the second report of Assistant Secretary of State George L. Rives, to whom President Cleveland delegated the task of preparing a draft of his arbitral award. In a passage set forth in the *Counter-Memorial*, a portion of which is worth repeating here, Rives said of Article IV of the treaty:

> "All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency within her reach. If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot be regarded as derelict if she fails to oppose foreign aggression in that quarter by her naval forces. . . . Costa Rica would only be bound to contribute to the defence of the stream by land, a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan."[401] (Emphasis in original)

5.12. This interpretation of the relevant portion of Article IV would seem to be the only one possible in light of (*a*) Nicaragua's exclusive sovereignty over the river under the 1858 Treaty, (*b*) the prohibition of navigation on the river by Costa Rican warships under the Cleveland Award, and (*c*) the restriction of navigation by Costa Rican revenue vessels (which are not defence vessels) to circumstances related to and connected with, or necessary to the protection of, navigation "*con objetos de comercio*," also under the Cleveland Award.

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[400] *See* NCM, para. 4.2.31.

[401] Report of George L. Rives (Second) (hereinafter "Rives Report"), pp. 211-212 of original handwritten version. NCM, Vol. II, Annex 71, p. 251.

5.13. Costa Rica, however, does not respond to Rives' analysis directly, confining herself to the statement that "'within its reach' does not necessarily correspond to 'from its shore'. It could equally well mean that each State shall act with maximum efficiency."[402] Costa Rica explains neither the implications of such an interpretation nor how the interpretation can be squared with the contemporaneous one made by Rives, as a neutral third party tasked with proposing a resolution of the dispute, or with President Cleveland's outright rejection of her pretension to navigate on the San Juan with military vessels.

5.14. Therefore, contrary to Costa Rica's contention, Article IV of the Treaty of Limits has no "implications for Costa Rica's navigation on the San Juan."

2. *Article VI of the Treaty of Limits*

5.15. After making the contention regarding Article IV of the Treaty of Limits discussed above, Costa Rica states in her *Reply*: "Moreover, Article VI establishes a perpetual right of free navigation for Costa Rica, *which of course includes navigation with public vessels*. This was recognized by the Second Article of the Cleveland Award . . . ."[403]

5.16. It is true that Article VI provides that "the Republic of Costa Rica shall have the perpetual right of free navigation" on the San Juan River. But what is inconvenient for Costa Rica is that Article VI says nothing about public vessels. Instead, it refers only to free navigation "*con objetos de comercio*": "*pero la República de Costa-Rica tendrà en dichas aguas, los derechos perpetuos de libre navegación, . . . con objetos de comercio . . . .* (but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation ... for the purposes of commerce)"[404]

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[402] CRR, para. 3.93.

[403] CRR, para. 3.79 (emphasis added).

5.17. Rights of free navigation with articles of trade (or even for purposes of commerce, as per Costa Rica's translation) are not exercised by Costa Rican public vessels, either today or in the mid-nineteenth century[405]. Perhaps realizing this, Costa Rica seeks refuge, not in Article VI itself, but in the Cleveland Award.

5.18. Costa Rica relies in this connection on the *Second* paragraph of the Cleveland Award. But she satisfies herself with merely quoting that paragraph, and adding that the paragraph "recognised" that a "right of free navigation for Costa Rica . . . of course includes navigation with public vessels"[406]. How the *Second* paragraph of the Cleveland Award[407] recognizes a right of "navigation with public vessels," or what kinds of public vessels other than those of the revenue service that are specifically mentioned, Costa Rica does not explain. This contention therefore remains an unsupported allegation.

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[404] Costa Rica-Nicaragua Treaty of Limits (Jerez-Cañas), 15 April 1858, in *Colección de las Leyes, Decretos y Ordenes expedidos por los Supremos Poderes Legislativo y Ejecutivo de Costa Rica en el año de 1858* (hereinafter "1858 Treaty (original Spanish version)"), Tomo XV,, 1871, Article VI. CRM, Vol. II, Annex 7(a), pp. 41-42.

[405] *See* NCM, para. 4.2.8.

[406] CRR, para. 3.79.

[407] Quoted in *ibid.*

5.19. And it is an allegation that is especially unsupportable in light of the question that Costa Rica put to President Cleveland at the arbitration, and his response to it. After quoting Article VI of the Treaty, Costa Rica asked President Cleveland: "Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?"[408] President Cleveland's response was to recognize *no* general right of Costa Rica to navigate with her public vessels on the San Juan River; instead he recognized only a right to navigate with vessels of the Costa Rican "revenue service," and only then as necessary for the "protection" of navigation "for purposes of commerce". This language plainly excluded the uses of the river identified by Costa Rica in her question to the Arbitrator, such as "to carry orders to the authorities of the bordering districts" or even "to prevent smuggling," since the revenue service vessels that President Cleveland permitted to navigate on the river had to be "related to and connected with her enjoyment of the 'purposes of commerce.'"

5.20. Any other navigation rights accorded to Costa Rican public vessels, including vessels of her police or border security forces, would be inconsistent with Nicaragua's entitlement – under the Cleveland Award – to exclusive dominion and supreme control (*sumo imperio*) over the river. This was recognized by President Cleveland, and it explains why he limited the use of the river by Costa Rican public vessels to those of the revenue service engaged in the protection of her right under Article VI of the 1858 Treaty to navigate "*con*

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[408] Argument of Costa Rica, *op. cit.*, p. 155. NR, Vol. II, Annex 5 (emphasis added).

objetos de comercio." Nevertheless, Costa Rica now asks the Court to adjudge and declare that Nicaragua has: "the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular article 2 of the Cleveland Award."[409] Costa Rica hopes the Court will not notice that she made virtually the same request of President Cleveland 130 years ago, and that he rejected it.

3. *Other Documents Invoked by Costa Rica*

5.21. Costa Rica expands her argument beyond the 1858 Treaty and the Cleveland Award, and invokes a number of other sources she alleges to be part of the "applicable law"[410]. This is curious in light of the parties' agreement that the scope of Costa Rica's navigational rights must be determined by reference to the Treaty of 1858 and the 1888 Cleveland Award. At paragraph 1.18 of the *Reply*, for example, Costa Rica correctly states that "the parties agree that Costa Rica's navigational rights are defined by the 1858 Treaty and the 1888 Cleveland Award." The point is significant because even as Costa Rica admits that the scope of her navigation rights is defined by the Treaty of 1858 and the Cleveland Award, she consistently seeks to expand those rights beyond the obvious limitations those instruments establish.

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[409] CRM, Submissions, 2(g).

[410] These sources are discussed in NCM, paras. 3.2.1-3.2.14.

5.22. To this end, Costa Rica invokes three additional instruments, calling them "relevant" without saying how they are relevant, or apposite, to the present case[411]. Costa Rica in fact refers to only one of them – the Cuadra-Lizano Joint Communiqué of 30 July 1998[412], discussed in Chapter II, Section II, and again below at paragraphs 5.94-5.99 – in attempting to answer Nicaragua's arguments. These instruments were all shown to be unhelpful to Costa Rica's case in the *Counter-Memorial*[413] and again in Chapter II, Section II. of this *Rejoinder*; the *Reply* fails to breathe any life into them.

B. COSTA RICA'S RESPONSE TO THE ANALYSIS IN THE *COUNTER-MEMORIAL* IS NO ANSWER TO NICARAGUA'S ARGUMENTS

5.23. Costa Rica attempts to answer Nicaragua's analysis of why she lacks "public rights of protection, custody and defence" of the kind she asserts[414]. These attempts will be shown to be ineffective in the following paragraphs.

5.24. Costa Rica asserts four reasons that she contends "militate in favour of a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms."[415] These "reasons" constitute assertions that Costa Rica, for the most part, makes no attempt to substantiate.

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[411] *See* CRR, para. 3.81.

[412] *See* "Ministry of Defence of Nicaragua – Ministry of Government, Police and Public Security of Costa Rica, Joint Communiqué (Cuadra-Lizano), Managua, 30 July 1998" (hereinafter "Cuadra-Lizano Communiqué"). CRM, Vol. II, Annex 28.

[413] *See* NCM, paras. 3.2.1-3.2.14.

[414] *See* CRR, paras. 3.86-3.94.

[415] CRR, para. 3.86.

5.25. "The first [of the reasons cited by Costa Rica] is that the re-supply of posts is covered by the right of free navigation for purposes of commerce in Article VI of the 1858 Treaty."[416] One would expect that such a remarkable assertion – and it would be remarkable even if "*con objetos de comercio*" were properly translated as "for purposes of commerce" – would then be explained and documented. But it is not. Instead, Costa Rica simply refers to her *Memorial*, which itself fails to show any logical or treaty-supported linkage between the "right of free navigation for purposes of commerce" on the one hand, and the "re-supply of [police] posts" on the other. Certainly, President Cleveland found no such linkage.

5.26. Without further explanation, the *Reply* proceeds directly to the second reason. "The second [reason] is that navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats."[417] Why not? Costa Rica never explains why protection of her right under Article VI – the right to navigate "*con objetos de comercio*" – requires the presence on the river of vessels of her police or other public forces, apart from those of her revenue service, whose use of the river President Cleveland expressly authorized, but only when necessary to protect Costa Rica's right to navigate "*con objetos de comercio*." By expressly limiting Costa Rica's use of the river to vessels of the revenue service, he necessarily excluded use by other public vessels, especially for purposes other than commerce. Finally on this point, it might be wondered why and from whom "navigation under Article VI of the 1858 Treaty" – i.e., navigation "*con objetos de comercio*" – would require protection. Costa Rica does not clarify this point, but presumably she does not mean such navigation would require protection from Nicaragua. In any event, it is Nicaragua, as the exclusive sovereign over the river, that has both the right and responsibility to provide police protection of navigation on the river.

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[416] *Idem.*

[417] *Ibid.*

5.27. Costa Rica's third reason is "for the defence of the common border and the common bays under Article IV of the Treaty"[418]. This argument has already been shown to be without merit[419]. In addition, Article IV itself specifically makes separate provision for each of the two sectors -- the bays and "the banks of the San Juan river." As has been demonstrated[420], Costa Rica may discharge her obligations to "protect" the San Juan River -- i.e., to contribute to the river's custody ("*guarda*") and defence -- only from her own banks, and only "in case of external aggression"[421].

5.28. The fourth reason given by Costa Rica for a "right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms" is that "it would be impossible, without adequate re-supplying of the border posts, to prevent or deter unlawful activities in the (land) border area (smuggling, trafficking in persons). It would also be impossible to fulfil official acts such as police investigations in a timely manner."[422]

5.29. Even assuming everything Costa Rica asserts in the above-quoted language is true, which is not proven (indeed, Costa Rica submits no proof whatsoever in support of this assertion), it would hardly constitute a legal justification for entering Nicaragua's sovereign territory and utilizing that territory to perform functions that should be performed on Costa Rican territory. This reason is part of the theme of Costa Rica's case: needs (even on land, and even though unproven) create rights (on the river). Obviously, they do not.

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[418] CRR, para. 3.86.

[419] *See* NR, paras. 5.8-5.14.

[420] *See ibid.*

[421] 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

[422] CRR, para. 3.86.

5.30. Moreover, the evidence shows that there is not even a need for Costa Rica to re-supply her border posts via the San Juan River. On the contrary, there is incontestable proof – found in Costa Rica's own Annexes, as will be described below – that she is able to re-supply her border posts along the right bank of the San Juan by land, and in fact does so. According to the Nicaraguan Army officer responsible for the San Juan River Province, "the Costa Rican Civil Guard usually re-supplies its posts by land, for which purpose they have feeder roads"[423]. Further, "he has even observed that a highway is being built in their territory, running parallel to the San Juan River"[424]. In fact, the roads to Costa Rica's border posts are depicted on Costa Rican maps, including the one shown in paragraph 5.98. Thus it seems clear that there is not even a need, let alone a right, for Costa Rica to re-supply her border posts via the river.

5.31. Costa Rica makes much fuss about Nicaragua's Presidential Decree No. 65-2005 of 28 September 2005, citing a press report of October 1, 2005, which she says has "aggravated" the "situation"[425]. Costa Rica reproduces several of the operative paragraphs of the decree, which is entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan

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[423] Affidavit of Colonel Ricardo Sánchez Méndez, 7 December 2006. NCM, Annex 91, p. 322.

[424] *Ibid.*

[425] CRR, para. 3.87.

Territorial Waters"[426]. Not surprisingly, Costa Rica omits the preambular paragraphs of this decree entirely. These paragraphs explain the motives for the decree, including the following:

> "IV
>
> After the time limit fixed in the Declaration of Alajuela, of September 26, 2002 expired, Costa Rican authorities have resumed an intense campaign along with statements made by some officials, with the claim of carrying out armed navigation in Nicaragua's San Juan River.
>
> V
>
> Any claim from foreign forces to carry out armed navigation in Nicaraguan sovereign waters constitutes – in itself – a threat to the country's internal and external peace and safety and lessens the essential interests of its safety.
>
> (…)
>
> VII
>
> The public claim to use the Nicaraguan sovereign waters of the San Juan River for the passing of armed personnel, relief, transportation of weapons, ammunition and any other foreign military or police activity, without an express authorization, constitutes an intolerable challenge to the sovereign attributions of dominion and sovereign jurisdiction that Nicaragua has over its waters along its whole length.
>
> (…)
>
> X
>
> Article III (Sovereignty) Clause 2 of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials of November 13, 1997, reads: "A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of

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[426] CRR, para. 3.88.

> functions which are exclusively reserved to the authorities of that other State Party by its domestic law."[427]

5.32. The decree, therefore, is a perfectly appropriate statement of the obvious: that a State will defend itself against unauthorized incursions by armed personnel of other States.

5.33. Costa Rica's characterization of it calls for the following remarks: *First*, Costa Rica gives no substantiation other than a single press account for her assertion that a "firing order" was issued[428]. Such serious allegations should be substantiated by official sources, not by sensational press accounts. *Second*, the expression "firing order," while it might sell newspapers, is inappropriately inflammatory when used in a pleading before the Court. It, in effect, suggests that Nicaraguan officers were authorized to "shoot on sight" when, in fact, by its own terms, the press account in question describes the "order" as "Intercept, capture or open fire," clearly treating the latter as a last resort – but one that would be open to any State if armed forces from another State entered its territory without authorization and refused to lay down their arms or leave. *Third*, again by its own terms, the press account relied upon by Costa Rica contains the following quotation from Colonel Ricardo Sánchez of the Nicaraguan Army: "there is no problem if Costa Rican boats navigate in the river, for commercial purposes [the original Spanish expression is not given], or if they bring tourists. But, we will not tolerate that Costa Rican guard enters armed"[429]. In an affidavit given on 7 December 2006, Colonel Sánchez, Chief of the Southern Military Detachment, which had the responsibility to provide security along the San Juan River, states that Costa Rican vessels carrying tourists were indeed permitted to navigate on the San Juan River provided they complied with the applicable Nicaraguan regulatory requirements[430]. Colonel Sanchez further states that "since he has held [his] position, the Costa Rican Civil Guard has not navigated the San Juan de Nicaragua River, nor has he received any permission request to engage in this activity"[431]. *Fourth*, the preamble of the Presidential Decree refers to the fact that "Costa Rican authorities have resumed an intense campaign along with statements made by some officials, with the claim of carrying out armed navigation in Nicaragua's San Juan River." Examples of these provocative statements by senior Costa Rican officials are provided below, at paragraphs 5.89-5.91. Given that such armed navigation is not permitted by the 1858 Treaty or the Cleveland Award and that it has been expressly prohibited by Nicaragua, it is only natural in view of Nicaragua's uncontested sovereignty over the river to regard the unauthorized entry into Nicaraguan territory by armed forces of another State as a threat to Nicaraguan territorial integrity and security. Any State would respond as Nicaragua did to such threats to its sovereignty. *Fifth*, after quoting the operative paragraphs of the decree, Costa Rica makes bold to contend that: "This order also amounts to a violation of Article IX of the Cañas-Jérez Treaty, according to which neither Costa Rica nor Nicaragua 'shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or on the San Juan river, or the Lake of Nicaragua'"[432].

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[427] Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Official Gazette No. 188 of September 29, 2005. CRR, Vol. II, Annex 69.

[428] *See* "Army guards the river", (*La Prensa*, 1 October 2005). CRM, Annexes, Vol. V, Annex 182, p. 743

(Original Spanish: "…Interceptar, capturar o abrir fuego es la orden que recibió ayer la patrulla nicaragüense de vigilancia del río San Juan, en caso de avistar una embaración con guardia ticos armados.

Enarbolando la Bandera de Nicaragua, azul y blanco, la lancha del Ejército Nacional recibió ayer la voz de zarpe del coronel Ricardo Sánchez, jefe del destacamento sur, para cumplir la misión de proteger la soberanía del río San Juan. La nave reforzó los puestos militares nicaragüenses ubicados en El Castillo, Bartola, Boca de San Carlos, Sarapiquí, Delta y San Juan de Nicaragua.

El capitán Justo José González, jefe de sector fronterizo y de la patrulla de vigilancia en el río, partió al mediodía del viernes junto a un contingente armado y los pertrechos necesarios para cumplir su misión.

El coronel Sánchez dijo que la medida no afectará la vida cotidiana de los colonos ni de los turistas.

'Inspeccionaremos que se cumpla con el derecho al zarpe y en caso de las embarcaciones costarricenses que ingresan por el río a actividades comerciales y traen turistas, no hay problema, lo que no toleraremos es que la guardia tica ingrese armada', advirtió el jefe militar.").

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[429] *Ibid.*

[430] *See* Affidavit of Colonel Ricardo Sánchez Méndez, 7 December 2006. NCM, Vol. II, Annex 91, pp. 321-2.

[431] *Ibid.*

5.34. It is of course Costa Rica that would be "commit[ting] [an] act of hostility against" Nicaragua by entering her territory under arms, not the other way around. It is therefore Costa Rica that would be in violation of Article IX by engaging in armed navigation on the San Juan, not Nicaragua for defending her territory. And this suggests a *sixth* and final observation: Putting the situation in the light most favourable to Costa Rica, there was clearly a serious dispute regarding Costa Rica's armed navigation on the San Juan River. Why, then, would Costa Rica invite conflict by stating she would do just that?

5.35. Costa Rica next returns to navigation by vessels of the revenue service. She states:

> "It may be recalled that under the Second Article of the Cleveland Award navigation by vessels of the Revenue Service is explicitly permitted:
>
> 'as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in [Article VI of the 1858 Treaty], or as may be necessary to the protection of said enjoyment.' (Emphasis added [by Costa Rica].)

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[432] CRR, para. 3.88.

> The last part of the phrase clearly points to defence matters. The Central American Court of Justice supported this reading when it pointed out that in the zone of common navigation, merchantmen as well as public revenue vessels have a free course over the River and free access to both banks."[433]

5.36. It has already been pointed out, in Chapter II, Section II, that the decision of the Central American Court of Justice has no precedential value in the present case, as the Court there was dealing with a different issue[434]. But even if that case were relevant, the Central American Court's decision will not support Costa Rica's assertion. That Court did not read the Second Article of the Cleveland Award as conferring rights as to "defence matters." To the contrary, it understood the Award as permitting use of the river, in Costa Rica's own words, by "merchantmen" as well as "public revenue vessels": in other words, vessels engaged in navigation "*con objetos de comercio*" or engaged, as necessary, in the protection of such navigation. This is no more than what President Cleveland decided in 1888. As explained in the *Counter-Memorial*[435], all of the available evidence points to President Cleveland's determination to restrict navigation on the San Juan by Costa Rican revenue vessels to the protection of navigation "*con objetos de comercio,*" not to a willingness, on his part, to permit their use for "defence" or related purposes. An examination of the *travaux préparatoires* of the Award, including the Rives report, confirms this conclusion.

5.37. President Cleveland explicitly placed two conditions on Costa Rica regarding navigation by any of her revenue vessels on the San Juan River: *First,* the vessels must be "related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in [Article VI of the 1858 Treaty]"; or *second*, such navigation must be "necessary to the protection of said enjoyment"[436]. Costa Rica, in the passage from her *Reply* quoted above, focuses upon the second condition. Insight into what the Arbitrator intended by this condition is provided in the second part of the report prepared by Assistant Secretary of State Rives, to whom President Cleveland delegated the task of drafting his arbitral award. These portions of Rives' second report were not in any way questioned by the Arbitrator; indeed, they appear to have guided President Cleveland's findings.

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[433] CRR, para. 3.89 (footnote omitted).

[434] *See* NR, paras. 2.124-2.128.

[435] *See, e.g.,* NCM, paras. 3.1.46-3.1.57; 4.2.26-4.2.27.

5.38. Rives first summarized Costa Rica's arguments regarding navigation on the San Juan with warships. In these arguments, Costa Rica: drew an analogy to ports of free entry and asserted that they were considered to be accessible to foreign men-of-war; contended that "by the usage of nations navigation of territorial waters by foreign public vessels can only be forbidden by express stipulation…;"[437] and further contended that Article IV of the 1858 Treaty, requiring that both States "contribute to the defence of the river in case of external aggression," meant that she "must be permitted to maintain her vessels on the San Juan in order to guard and defend it with all the efficiency within her reach"[438]. These arguments have particular resonance today, one hundred years later, since they are similar to those Costa Rica makes in this case.

5.39. Rives responded bluntly to Costa Rica's contentions concerning navigation on the San Juan River by her "public vessels":

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[436] Cleveland Award, *op. cit.*, para. *Second*. CRM, Vol. II, Annex 16.

[437] *Ibid.*

[438] Rives Report, *op. cit.*, p. 56 of original handwritten version. NCM, Vol. II, Annex 71, p. 253 (emphasis added).

> "Some of these arguments may be dismissed at once.
>
> The prohibition of acts of hostility on the river, cannot be construed as conferring on Costa Rica a right to maintain upon its waters public vessels in time of peace. The implication, instead would seem to be the other way.
>
> The right of Nicaraguan vessels to land freely on the Costa Rican side confers no right on Costa Rica to maintain a river police. She has undoubtedly the right to establish Custom Houses along the River and to maintain a force of revenue officers. But this force need not necessarily patrol the river in boats. This may be a convenient way of preventing smuggling; but it is not so necessary an incident to the rights of Costa Rica to enforce her customs laws as to be inevitably implied ex-necessitate from the provisions of the treaty."[439]

5.40. Thus, even navigation by public vessels of Costa Rica's revenue and customs service is not ordinarily necessary to protect her navigational rights on the river. As Rives found, customs enforcement on a river as narrow and sparsely trafficked as the San Juan can just as effectively be performed from land. Rives' obvious reluctance to find in the Treaty a right of navigation for Costa Rican public vessels is not surprising in light of another passage in the second part of his report, in which he emphasizes the consequences of Nicaraguan sovereignty over the San Juan River. The passage reads as follows:

> "It must not be forgotten that the sovereignty and jurisdiction of Nicaragua extend over all the waters of the San Juan. In the unusual and forcible language of the Treaty, she possesses exclusively the dominion and supreme control of these waters. Costa Rica is bounded not by the thalweg, or the middle of the stream, but by its right bank. Any vessel navigating the river is, therefore, within

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[439] *Ibid.*, pp. 56-57 of original handwritten version (emphasis added).

> Nicaraguan territory; and on Nicaragua falls exclusively the duty of policing the stream."[440]

5.41. This passage highlights the difficulty, in view of Nicaragua's exclusive sovereignty over the river, of finding rights in Costa Rica to navigate on the San Juan with public vessels of her security forces. It also shows that the official to whom President Cleveland delegated authority to prepare a recommended award concluded that the Treaty compelled the conclusion that Nicaragua "exclusively" had the right, and duty, to police the stream.

5.42. In light of the foregoing, only the rare circumstances would make navigation on the river by Costa Rican revenue service vessels "necessary to the protection of [the] enjoyment [of Costa Rica's rights of navigation '*con objetos de comercio*']." As Rives wrote, Costa Rica was perfectly capable of enforcing her customs laws from her own territory, and if doing so from the Nicaraguan river was not necessary at the time of the Cleveland Award it would seem even less necessary today.

5.43. Costa Rica's argument in 1888, regarding Article IV of the 1858 Treaty of Limits, also sounds remarkably similar to her argument today. Costa Rica's prior argument is worth quoting at length because it so closely parallels the content and tenor of her current presentation:

> "All that I have said in this portion of my work in explanation of the facts and law which relate to the subject might be erroneous, badly brought, irrelevant, and absolutely inadmissible on general principles, and, nevertheless, it would be true that Costa Rica can navigate with men-of-war and other Government vessels on the

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[440] *Ibid.*, p. 58 of original handwritten version (emphasis added).

> waters of the San Juan river. It is Nicaragua herself who has solemnly granted that right by an article of that very same treaty which she alleges to be doubtful or capable of different interpretation.
>
> 'Costa Rica shall also be bound,' says the second part of Article IV of the treaty, 'owing to the portion of the right bank of the San Juan river, which belongs to it, ... to co-operate in its custody; and the two Republics shall equally concur in its defence in case of foreign aggressions; and this will be done by them with all the efficiency that may be within their reach.'
>
> It can be seen by these phrases, as plainly and transparently as they can be, that Costa Rica has not only the right but the duty, or to follow exactly the language of the treaty, the "obligation," not only of watching, guarding, and defending its own river bank, but of contributing to the custody and defence of the other bank belonging to Nicaragua.
>
> ...
>
> Let it not be said that the authority to navigate with men-of-war is only confined to the special case of foreign aggression. The treaty does not refer to this case exclusively, but speaks also of guard or custody, which means watching, vigilance, and other things of permanent character and necessarily previous to actual defence. This, especially in a river, cannot be improvised at the very same instant that trouble arises; since, in order that it may be possible and efficient, a perfect knowledge of the locality, which cannot be acquired except by navigating the same river, is absolutely indispensable."[441]

5.44. Rives found Costa Rica's Article IV argument unpersuasive:

> "The stipulations of Article IV throw no light on this question. All that Article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency *within her reach.* [Emphasis in original.] If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot

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[441] Argument of Costa Rica, *op. cit.*, pp. 159-160. NR, Vol. II, Annex 5.

> be regarded as derelict if she fails to oppose foreign aggression in that quarter by her naval forces. Impossibilities are not required. *Costa Rica would only be bound to contribute to the defence of the stream by land, a mode of defence, it may be added which seems better adapted to a River of the size and character of the San Juan.*"[442]

5.45. Nothing in the *Second* paragraph of President Cleveland's award is contrary to any of the quoted passages from the Rives report. Indeed, all indications are that the Arbitrator based his findings on Rives' analysis. Thus, when President Cleveland states that Costa Rica may navigate on the San Juan with such revenue vessels "as may be *necessary* to the protection of said enjoyment," he is best understood as incorporating the concept of "necessity" articulated by Rives. As Rives wrote, while it might be "convenient" for Costa Rican revenue officers to ply the San Juan in revenue vessels to prevent smuggling, they "need not *necessarily* patrol the river in boats." Patrolling on the river "is not so *necessary* an incident to the rights of Costa Rica to enforce her customs laws as to be inevitably implied ex-necessitate from the provisions of the treaty"[443].

5.46. The conclusion is unmistakable: when President Cleveland rejected Costa Rica's alleged right to navigate with ships of war, he necessarily also rejected the rationales Costa Rica had offered to support that would-be right, including Article IV of the 1858 Treaty and the need to "guard" the river. Insofar as Costa Rica has repeatedly accepted the Cleveland Award as binding – a position expressly reiterated in both the *Memorial* and *Reply* – she cannot now be heard to argue that President Cleveland's disposition of her arguments constitutes anything less than *res judicata*. Indeed, it is telling that Costa Rica has admitted that "the President correctly gauged the scope of Costa Rica's right [to navigate with public vessels]"[444]. Accordingly, this Court cannot but follow President Cleveland's lead and reject Costa Rica's claim that she has either the right or the obligation to patrol the San Juan River with police boats performing security-related functions.

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[442] Rives Report, *op. cit.*, pp. 56-58 of original handwritten version. NCM, Vol. II, Annex 71, p. 253-254 (emphasis added).

[443] *Ibid.*, p. 57 of original handwritten version (emphasis added).

5.47. This conclusion is borne out by Costa Rica's actual customs enforcement practices over the last 150 years since the Treaty of Limits was executed. As will be shown below, Costa Rica *has failed to submit any evidence* that her revenue service or other customs enforcement vessels *ever* navigated on the San Juan River for the purpose of protecting her enjoyment of the right to navigate "*con objetos de comercio*." To the contrary, the evidence shows that Costa Rica's customs enforcement activities over the last century and a half have been carried out on land, or on rivers exclusively within Costa Rican territory (*i.e.* the Sarapiquí, the San Carlos, and the Colorado Rivers).

5.48. This background renders implausible Costa Rica's next contention: that President Cleveland "ruled that Costa Rica's public vessels were entitled to their own, specific treaty right to navigate on the River"[445]. Costa Rica seeks to support this contention in two ways: *first*, by quoting paragraph *Second* of the Cleveland Award; and *second*, curiously, by referring to the fact that President Cleveland rejected Rives' proposal of a broad right of navigation on the river for Costa Rican public vessels. These bases of Costa Rica's argument will be examined in turn.

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[444] CRR, para. 3.90.

[445] *Ibid.*

5.49. *First*, merely referring yet again to the *Second* paragraph of the Cleveland Award does not assist Costa Rica. The most obvious problem the paragraph poses for Costa Rica has just been noted: all of the evidence -- including President Cleveland's having banned navigation by Costa Rican warships, and his disposition to restrict navigation by Costa Rican revenue vessels to circumstances when it is necessary to protect her right of navigation "*con objetos de comercio*" -- points in the direction of *no* navigation by Costa Rican public vessels, not the opposite.

5.50. *Second*, as even Costa Rica recognizes[446], President Cleveland rejected the broad right of navigation "with vessels of war or of the revenue service" proposed by George Rives. Rives' proposal was based on a theory similar to the position advocated by Costa Rica in the arbitration: assimilation of a right of public vessels to navigate on the San Juan River to the general right to navigate with public vessels in the waters of a State's territorial sea. Costa Rica seeks to turn President Cleveland's rejection of this proposal to her advantage, arguing that rather than restricting her navigation rights, the Arbitrator was actually enlarging them:

> "President Cleveland . . . consider[ed] that Costa Rica held more than simply a 'privilege' enjoyed by everybody. This is why he ruled that Costa Rica's public vessels were entitled to their own, specific treaty right to navigate on the River."[447]

5.51. The effect of Costa Rica's argument is that she professes to consider that the explicit controls placed on her public vessels by President Cleveland (no warships; revenue service vessels may use the river only to protect navigation

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[446] *See ibid.*

[447] *Ibid.*

"*con objetos de comercio*") are preferable to the broad latitude accorded these vessels under the Rives proposal. That is, she asks the Court to view this limiting decision by President Cleveland in a light favourable to her. But, the effect of President Cleveland's action is precisely the contrary. In rejecting Rives' proposal regarding "vessels of war or the revenue service," President Cleveland demonstrated clearly his determination to respect Nicaragua's sovereignty over the San Juan River by prohibiting the use of the San Juan by Costa Rican public vessels, with only one exception: revenue service vessels engaged in protection of the right to navigate "*con objetos de comercio*."

5.52. With respect to President Cleveland's language, it is telling that he chose a form of words that makes clear that Costa Rica's right of navigation on the San Juan with revenue vessels is derivative of and entirely dependent on navigation "*con objetos de comercio*" under Article VI of the 1858 Treaty. It is not a free-standing right. Thus, Costa Rican public vessels are only permitted on the river to the extent their presence "may be related to and connected with" or "necessary to the protection of" her "enjoyment of the 'purposes of commerce' accorded to her" in Article VI. By necessary inference, Costa Rican revenue service and other public vessels are *not* permitted on the San Juan for any other reason.

Section II. Evidence of the Parties' Subsequent Practice

5.53. Costa Rica attempts to support her claim to a broad right to navigate the San Juan with public vessels carrying police with normal arms by invoking what she calls the "solid practice" supporting that claim. The fallacy of this assertion will be exposed in detail in the following sections of this chapter. As the Court will read, Costa Rica's arguments not only find no support in the record, they are expressly refuted by that State's own evidence. Before turning to that point, however, Nicaragua will first address elements of the historical record that show why there was and is no practice to buttress Costa Rica's case. In short, the evidence available is conspicuous in its sparseness precisely because, until Costa Rica's policy change in 1998, both parties always understood that Costa Rica had no right to navigate the San Juan with public vessels.

A. THE SOTO-CARAZO TREATY OF 26 JULY 1887

5.54. The parties agreed to submit their dispute concerning the validity and interpretation of the Treaty of 1858 to arbitration by President Cleveland by treaty dated 24 December 1886[448]. But the agreement to submit their dispute to arbitration did not put an end to their efforts to settle the case extra-judicially. To the contrary, they continued to negotiate between themselves in an effort to arrive at a mutually acceptable resolution. Those efforts yielded a treaty dated 26 July 1887 which affirmed the validity of the Treaty of 1858, resolved points of disputed interpretation arising from that treaty, and created new rights. The 1887 Soto-Carazo Treaty was promptly ratified by formal act of the Constitutional Congress of Costa Rica on 9 August 1887, just 14 days after its execution. It was ultimately rejected by Nicaragua, however, which decided to maintain her objections to the Treaty of 1858 and press forward with the arbitration.

5.55. Although the 1887 treaty never came into force, it does contain a provision bearing directly on the issues now before the Court. Nicaragua, of course, recognizes that the 1887 treaty does not have the force of law. Nonetheless, to the extent that it was ratified by the Costa Rican Congress (in just two weeks, no less), it constitutes probative evidence as to how Costa Rica contemporaneously understood her right (or non-right) to navigate the San Juan with public vessels under the Treaty of 1858, especially to the extent that her contemporaneous understanding contradicts the position she now takes in this litigation[449].

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[448] *See* NCM, para. 4.

5.56. Article VI of the Soto-Carazo Treaty addresses the issues of disputed interpretation of the Treaty of 1858, and provides that "[t]he aspects of questionable interpretation of the Treaty of 15 of April 1858 that have been presented to date are resolved in the following terms"[450] therein stated. One of the issues so resolved concerned Costa Rica's right to navigate on the San Juan with public vessels. According to paragraph 3 of Article VI:

> "The right, granted to Costa Rica, of navigation for [*objetos de comercio*] in the San Juan River, from its mouth to three English miles before Castillo Viejo, ***does not include navigation with war or fiscal vessels exercising jurisdiction.***"[451]

5.57. Thus, as of 1887, just 29 years after the conclusion of the 1858 Treaty and on the eve of the Cleveland Arbitration, Costa Rica recognized that she had no right to navigate on the San Juan with public vessels exercising jurisdiction. It is unlikely that President Cleveland would have been unaware of this Treaty that would have put an end to his arbitration. As Arbitrator he could not have failed to note that the Treaty had been fully acceptable to one of the parties, and the thinking behind his Award would have taken this into consideration.

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[449] *See Case concerning Military and Paramillitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, Merits, paras. 64-73.

[450] CRM, Vol. II, Annex 15, p. 90.

[451] *Ibid* (emphasis added).

5.58. This interpretation, of course, flows naturally from the plain text of Article VI of the Treaty of 1858 which gives Nicaragua "*exclusive* dominion and supreme control (*sumo imperio*)" over the San Juan River. Indeed, the significance of the word "exclusive" in Article VI should not be overlooked. In English as well as Spanish, its meaning is both simple and indisputable. According to *Webster's College Dictionary*, it means "not admitting of something else"; "omitting from consideration or account"; "limited to that which is designated"; "shutting out all others from a part or share"[452]. The dictionary of the Spanish Royal Academy is to the same effect. "*Exclusivo*" means "*que excluye o tiene fuerza y virtud para excluir*"; "*único, solo, excluyendo a cualquier otro* (that which excludes or has the power or right to exclude; unique, only, excluding any other)"[453]. Costa Rica herself has always recognized that Nicaragua alone enjoys sovereignty over the river[454]. The acceptance of any Costa Rican jurisdiction on or over the San Juan River would therefore be inconsistent with the plain terms of Article VI of the Treaty of 1858 – exactly as Costa Rica recognized when she ratified the 1887 Soto-Carazo Treaty and thereafter.

5.59. It is for this reason that President Cleveland took such evident pains to circumscribe Costa Rica's right to navigate the San Juan with vessels of the revenue service. By anchoring them in, and making them attendant to, Costa Rica's right to navigate "*con objetos de comercio*" under Article VI, he ensured that this narrow exception to Nicaragua's otherwise exclusive sovereignty was kept within proper bounds.

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[452] *Random House Webster's Unabridged Dictionary*, Second Edition, 1998.

[453] Royal Spanish Academy, *Dictionary of the Spanish Language*, Twenty-second Edition, Available at: http://www.rae.es/.

[454] *See* CRR, para. 2.69; *See also*, CRM, Vol. III, Annex 80.

5.60. The soundness of President Cleveland's ruling, and the logic of his rejection of Costa Rica's arguments, were well captured at the time by one of Costa Rica's most prominent jurists, Ricardo Jiménez Oreamuno, who served as President of Costa Rica on three separate occasions. Writing about the Award just after it was issued in 1888, he explained it as follows:

> "*Las Novedades* [a Spanish language newspaper] of New York criticizes the award because it does not give us the right to navigate in the San Juan with vessels of war. The criticism, I would say, is unfounded. The emphasis with which article 6 of the treaty consigns that Nicaragua shall have the *dominion and sovereignty* over the waters of the river manifests a desire to establish a difference between the rights that were agreed that Nicaragua and Costa Rica would have in those waters. Now, if merchant ships and vessels of war of both Republics navigate freely and indistinctly on the river; where is it manifested, what practical effect does the solemn declaration have that the dominion and sovereignty over the waters corresponding to Nicaragua? The rest of that article corroborates this meaning. It was considered that that absolute affirmation would take away from Costa Rica all use, all enjoyment of the river, and as that was not the intention, the exception was put immediately thereafter, which stipulated that Costa Rica would have in said waters perpetual rights of free navigation, with 'objects of trade.' *If the exception does not also appear in the article in favor of vessels of war, the inference is logical: it was not thought that Costa Rica had that right.* The argument that is gleaned from article 4, regarding the obligation that Costa Rica has to contribute to the defence of the river in case of foreign aggression, was perceived as much less than conclusive. Costa Rica shall contribute to that defence when the foreseen hypothesis occurs. In the meantime, in time of peace, without the most remote risk of hostilities, to pretend that our vessels of war navigate to contribute to a defence that no attack provokes is to get to the subtleness with which the Nicaraguans examined the treaty. Costa Rica, by virtue of article 4, was obligated to defend the San Juan as an ally of Nicaragua; and, when has it been seen that an ally, by being an ally, pretends to have the right, without there being a war, to

> transit with troops through the allied territory, navigate its internal waters with vessels of war or station fleets in its ports?"[455]

5.61. Nicaragua is content to adopt the words of President Jiménez Oreamuno as her own. Costa Rica has not the right of navigation of the San Juan River with any public vessels, including police vessels, performing defence or other security-related functions. Just as Nicaragua previously showed[456], the only exception to this rule arises in the event of foreign aggression as mentioned in Article IV of the Treaty of 1858, in which case Costa Rica may (at Nicaragua's request) contribute to the defence of the river. There has, however, never been any such foreign aggression, and Costa Rica.

5.62. It may be seen from the foregoing that Costa Rica has failed to offer a persuasive response to Nicaragua's showing, in the *Counter-Memorial*, that the Applicant State lacks "public rights of protection, custody and defence" of the San Juan River. These alleged rights find no basis in the 1858 Treaty as interpreted in the 1888 Cleveland Award, which together constitute the applicable law in this case. To be sure, the Cleveland Award recognizes a limited right of Costa Rica to navigate the San Juan River with vessels of her revenue service. Nicaragua has always recognized that right. However, as will be shown below, Costa Rica has presented no evidence that she ever sought to exercise it – that is, she has offered no evidence that she ever sought to use the San Juan River to protect navigation "*con objetos de comercio*." Nor has Costa Rica presented evidence that Nicaragua ever denied or prevented her exercise of this right.

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[455] Ricardo Jiménez Oreamuno, *His Thoughts*, 1980, p. 55. NR, Vol. II, Annex 32 (emphasis added).

[456] *See* NCM, paras. 4.2.28-4.2.36; 5.2.1-5.2.12.

B. COSTA RICAN PUBLIC VESSELS HAVE NEVER ATTEMPTED TO PROTECT NAVIGATION "*CON OBJETOS DE COMERCIO*" OR HAD THE NEED TO DO SO

5.63. Nicaragua agrees that Costa Rica has a right under Article VI of the 1858 Treaty of Limits, as interpreted by paragraph *Second* of the Cleveland Award, to navigate on the San Juan River "with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary for the protection of said enjoyment"[457].

5.64. However, there is no evidence that Costa Rica ever exercised this right, or that Nicaragua interfered with it. At no place in her *Memorial*, or in her *Reply*, or in any of the 317 annexes to her pleadings, does Costa Rica cite even a single example of navigation on the San Juan River by a vessel of her revenue service related to, or connected with, or necessary for the protection of her enjoyment of the "purposes of commerce." Nor does Costa Rica offer evidence that Nicaragua prevented or otherwise interfered with the navigation of any such vessel. This is a rather remarkable omission from Costa Rica's pleadings, and it cannot have been an oversight. It must mean that Costa Rica has no such evidence to offer.

5.65. This conclusion is reinforced by the evidence on navigation by her public vessels that Costa Rica does submit. This evidence, consisting of a handful of contemporaneous documents from 1892, 1894-1909, 1915, 1968, 1991-1992 and 1994-1998, as well as affidavits from current and former police officers, shows that navigation on the San Juan River by Costa Rican public vessels has been infrequent and for very limited purposes, and that it has never been related to, connected with, or for the purpose of protecting commerce. Rather, Costa Rica's evidence demonstrates that on the relatively rare occasions when her public vessels have navigated on the San Juan River they have done so for one of three purposes: (1) to bring supplies or replacement personnel to police posts in Costa Rica; (2) to carry out certain law enforcement activities; or (3) to deliver medical or other social services to riparian communities. None of these actual uses of the river is related to, connected with, or necessary to protect Costa Rica's enjoyment of the "purposes of commerce," and therefore none of them is encompassed within the right afforded to Costa Rican revenue service vessels under paragraph *Second* of the Cleveland Award. That explains why Costa Rica regularly sought and obtained prior authorization from Nicaragua before navigating on the river with her public vessels for each of these purposes. On occasion, as Costa Rica's evidence shows and Nicaragua does not deny, Nicaragua refused to authorize the requested navigation. But Nicaragua's refusal cannot constitute a violation of Costa Rica's rights because Costa Rican public vessels have no right to navigate on the river when the navigation is not related to, connected with, or to protect Costa Rica's enjoyment of navigation "*con objetos de comercio*."

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[457] Cleveland Award, *op. cit*, para. *Second*. CRM, Vol. II, Annex 16, p. 98.

5.66. As demonstrated above, the San Juan River stopped serving as an outlet for Costa Rica's foreign trade soon after the Treaty of Limits was executed in 1858. For the reasons explained in Chapter III, at paragraphs 3.53-3.58, the route from central Costa Rica to Puerto Viejo de Sarapiquí by land, and then down the Sarapiquí River to the San Juan River and from there to the sea, and was soon abandoned in favor of other routes to the Atlantic, especially after the railroad was put into operation between Central Costa Rica and Puerto Limón on her Caribbean coast in the last quarter of the nineteenth century. Costa Rica's commerce on the San Juan River was strictly local, consisting of nothing more than trade in basic goods and groceries between the Costa Rican interior and the few and sparsely populated riparian communities that existed on the right bank of the San Juan, and between those communities and the Nicaraguan town of San Juan del Norte. As shown in Chapter III, nothing has changed in this regard for the past century and a half. Trade on the San Juan River has remained strictly local, and of low volume, carried on in small, privately-owned boats operated by sole proprietors without crews[458].

5.67. This explains why Costa Rica has never employed revenue service vessels on the San Juan River to protect her enjoyment of commerce there. The trans-Atlantic trade via the San Juan River envisioned in the mid-19th century, and which Costa Rica sought to safeguard by insisting that her commercial navigation rights be recognized in the 1858 Treaty, never materialized. That was the commerce that Costa Rica intended to protect with her revenue service vessels, not the local trade between small communities along the San Juan River that has actually taken place. This trade has been so localized that for much of the last 150 years Costa Rica has treated it as internal, and has had no customs posts through which goods entering Costa Rican waters from the San Juan have had to pass. During those periods when customs posts were maintained, Costa Rican authorities required vessels to stop for processing only after they entered Costa Rican waters, that is, after they left the San Juan and entered the Sarapiquí, the San Carlos or the Colorado Rivers. They conducted no customs enforcement activities on the San Juan itself.

5.68. Costa Rica's contemporaneous documentary evidence reflects no navigation by Costa Rican revenue service or other fiscal or customs vessels on the San Juan. Nor does it reflect any customs enforcement by Costa Rican vessels on the San Juan. Costa Rica admits that she had no Revenue Guard at all until 1886 (28 years after the Treaty of Limits was executed), and even then that it was established on the Colorado River[459]. Belying Costa Rica's assertions, the reports of the local Guard commanders covering the period 1894 to 1909 say nothing about the presence of Costa Rican vessels on the San Juan[460]. To the contrary, the report of 31 March 1894 states: "The security services along the San Carlos, Sarapiquí, Tortuguero, Revantazón, and Parsimina Rivers and the Pereira and Palma channels all in Costa Rica, as shown below in Sketch Map 8, continues uninterrupted; the less important channels are also safeguarded as long as the other duties allow it"[461]. The San Juan River is conspicuous by its absence from this list.

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[458] *See* NR, paras. 4.12-4.22

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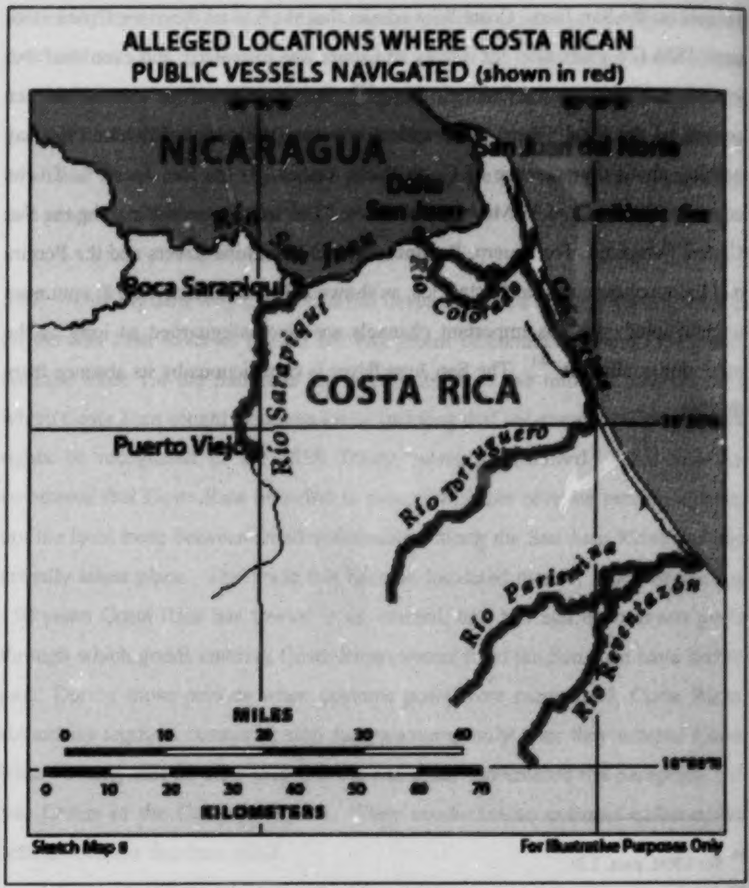
[459] *See* CRM, para. 2.31.

[460] *See* "Report of the Commander of the Post Río Colorado-Colonia Irazú to the General Inspector of the Treasury, 31 March 1894". CRM, Annexes, Vol. VI, Annex 211; *see also* "Report of Rafael Cruz, Commander of the Post Río Colorado, to the General inspector of the Treasury, Note No. 89, 10 March 1895". CRM, Annexes, Vol. VI, Annex 212; "Report of the Sub-Inspector to the Treasury of Colorado to the General Inspector of the Treasury, 24 November 1908". CRM, Annexes, Vol. VI, Annex 215; "Report of the Sub-Inspector to the Treasury of Barra del Colorado to the General Inspector of the Treasury, 7 December 1909". CRM, Annexes, Vol. VI, Annex 216.

[461] "Report of the Commander of the Post Río Colorado-Colonia Irazú to the General Inspector of the Treasury, 31 March 1894". CRM, Annexes, Vol. VI, Annex 211.



ALLEGED LOCATIONS WHERE COSTA RICAN PUBLIC VESSELS NAVIGATED (shown in red)

NICARAGUA
San Juan del Norte
Delta San Juan
Caribbean Sea
Río San Juan
Boca Sarapiquí
Río Colorado
COSTA RICA
Puerto Viejo
Río Sarapiquí
Río Tortuguero
Río Parismina
Río Reventazón
MILES
0 10 20 30 40
0 10 20 30 40 50 60 70
KILOMETERS
Sketch Map 8
For Illustrative Purposes Only

5.69. The report of 10 March 1895 describes the areas of coverage of two Guard posts on the bank of the Colorado River, and two on the Costa Rican bank of the San Juan River[462]. All of the areas mentioned are in Costa Rica. The areas covered by the two posts on the San Juan, at the mouths of the Sarapiquí and San Carlos Rivers, extend from those posts *upriver*, that is, inside Costa Rican waters. The listed coverage does not include the San Juan. The same report describes the seizure of "three boats carrying imported goods from San Juan del Norte, that attempted to go unnoticed by the guards in order to avoid the payment of export rights…"[463]. The description of the event (the only customs seizure mentioned in the report) makes it plain that it occurred upon the boats' entry into Costa Rican waters. Equally unhelpful to Costa Rica is the report of 7 December 1909 which was presumably submitted because of the statement that "I ordered, up to the Sarapiquí Guard Post, to conduct a general home search of the neighbors on the margins of the San Juan River at the beginning of this month with the purpose of finding out whether any revolutionaries had taken refuge there"[464]. Quite obviously, a "general home search" could only be undertaken on land. There is no mention or reason to assume that navigation on the San Juan River was attendant to this activity.

5.70. Citing these very reports, Costa Rica argues in her *Memorial* that "[u]ndoubtedly these fiscal guards used the San Juan to perform their duties"[465]. To the contrary, the reports themselves make no mention of any navigation on the San Juan River, and leave no reason to presume that it occurred. All of the Costa Rican posts mentioned in the reports were accessible by river transport from within Costa Rica, without the need to transit the San Juan River. And all of the mentioned riparian communities were accessible to the Costa Rican Guards without traversing the San Juan River.

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[462] *See* "Report of Rafael Cruz, Commander of the Post Rio Colorado, to the General inspector of the Treasury, Note No. 89, 10 March 1895". CRM, Annexes, Vol. VI, Annex 212.

[463] *Ibid.*, p. 865.

[464] "Report of the Sub-Inspector to the Treasury of Barra del Colorado to the General Inspector of the Treasury, 7 December 1909". CRM, Annexes, Vol. VI, Annex 216.

[465] CRM, para. 4.89.

5.71. Costa Rica's evidence jumps from 1909 to 1915, with the presentation of two reports from the customs inspector at Rosalía, a Costa Rican town located on the San Carlos River, upstream from its mouth, which is at the San Juan River. These reports describe activities is entirely inside Costa Rica, between Rosalía and Boca San Carlos[466]. There is no mention of any activity on the San Juan.

5.72. The next jump in Costa Rica's evidence is from 1915 to 1968, a distance of 53 years for which she provides no evidence of her activities. Costa Rica presents three 1968 reports from a Revenue Guard inspector at Boca San Carlos[467]. None of them mentions any navigation on the San Juan River, let alone navigation related or connected to enjoyment of the "purposes of commerce." The report of 26 July 1968 is typical. It says "I am sending a complaint filed in this office by Mr. Pablo Lozano, regarding Ipecac located in the place named INFIERNITO, by the San Juan River"[468]. This is a reference to a tiny riparian hamlet on the Costa Rican bank of the river. It is accessible by land from Boca

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[466] *See* "Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915". CRR, Vol. II, Annex 31; *see also* "Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915". CRR, Vol. II, Annex 32.

[467] *See* "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968". CRR, Vol. II, Annex 33; *see also* "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968". CRR, Vol. II, Annex 34; "Note from Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968". CRR, Vol. II, Annex 35.

[468] "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968". CRR, Vol. II, Annex 33.

San Carlos. There is no indication in the report of any use of the San Juan River to get there, or if there were, what relevance it would have, since the matter did not involve commerce on the river. The same could be said for the report of 29 July 1968, which mentions only that the inspector went "to the place called Poco Sol, by the San Juan River, in order to verify the felling of trees…"[469]. Again, there is no mention of navigation on the San Juan River, and the event had no apparent relation to commerce on the river.

5.73. Finally, Costa Rica jumps another 23 years, from 1968 to 1991, and presents three reports from the Chief of Police at Puerto Viejo de Sarapiquí dated, respectively August 1991, April 1992 and May 1992[470]. None of these reports refers to any specific activities carried out on the San Juan River, let alone activities related to, connected with, or to protect the enjoyment of navigation "*con objetos de comercio.*" There is no mention of any customs enforcement, because there was no customs activity; the customs post that had formerly been at Puerto Viejo de Sarapiquí had been removed decades earlier. The May 1992 report states that: "On Thursday, 21 May 1992, we patrolled on the San Juan River up to Islas Morgan and to the mouth of San Juan del Norte, and everything was normal"[471]. This is the first and only mention of any patrolling activity by Costa Rica on the San Juan River between 1858 and 1992, and there is no explanation as to the purpose of the activity. There is no indication of any relation to, or connection with, the enjoyment of the "purposes of commerce."

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[469] "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968". CRR, Vol. II, Annex 34.

[470] *See* "Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991". CRR, Vol. II, Annex 36; *see also* "Costa Rican Police Major and Chief of the Post, Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.D.O. 81-92, 29 April 1992". CRR, Vol. II, Annex 37; *see also* "Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992". CRR, Vol. II, Annex 38.

[471] "Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992". CRR, Vol. II, Annex 38.

5.74. That is all the evidence Costa Rica presents, in her two pleadings and related Annexes, on her use of revenue or other fiscal vessels to "protect" her enjoyment of navigational commerce on the San Juan. By the 1970s, Costa Rica had removed her customs inspection facilities from the right bank of the San Juan, as well as from Puerto Viejo de Sarapiquí and Rosalía. Thereafter, there was no customs enforcement with respect to any goods emanating from the Costa Rican riparian communities on the San Juan, or from San Juan del Norte. That situation has persisted to the present day. This is confirmed by the affidavit testimony, attached hereto, of each of the five Nicaraguan Army commanders who have been directly responsible for maintaining security on the San Juan between 1979 and 2006[472]. The commanders all testify that the only Costa Rican commerce on the river has been local, that it has never been threatened or endangered, that Costa Rica has never dispatched public vessels to the San Juan for the purpose of "protecting" this commerce, that Costa Rica has not maintained any customs posts on her side of the river or required goods entering Costa Rica from the San Juan to pass through any customs inspection, and that Costa Rica has never carried out or attempted to carry out any customs enforcement activity on the river[473]. The following conclusions must therefore be drawn: (1) Costa Rica has not demonstrated that she has ever employed revenue service vessels, or other public vessels, on the San Juan River for the purpose of protecting her right of navigation "*con objetos de comercio*" on the river; and (2) Costa Rica has not demonstrated that Nicaragua has ever violated the right referred to in paragraph *Second* of the Cleveland Award.

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[472] *See* Talavera Affidavit, NR, Vol. II, Annex 78; *see also* Sánchez Affidavit, NR, Vol. II, Annex 77; *see also* Largaespada Affidavit, NR, Vol. II, Annex 72; *see also* Membreño Affidavit, NR, Vol. II, Annex 73; *see also* Centeno Affidavit NR, Vol. II, Annex 69.

[473] *See* Talavera Affidavit, paras. 8-10. NR, Vol. II, Annex 78; *see also* Sánchez Affidavit, , paras. 4 & 6-7. NR, Vol. II, Annex 77; *see also* Largaespada Affidavit, paras. 3 & 7-9. NR, Vol. II, Annex 72; Membreño Affidavit, paras. 4-6 & 9-10. NR, Vol. II, Annex 73; Centeno Affidavit, para. 4. NR, Vol. II, Annex 69.

5.75. While Costa Rica has never sent her revenue or other public vessels onto the San Juan River for the purpose of protecting navigational commerce, she has sent public vessels onto the river for three other purposes since 1858, as indicated above: to bring supplies and replacement personnel to police posts; to carry out occasional law enforcement activities; and to provide social services to riparian communities. These actual uses of the river by Costa Rica, and the responses of Nicaraguan authorities in granting or denying permission for them, are discussed in turn below.

C. SUPPLYING AND BRINGING REPLACEMENT PERSONNEL TO POLICE POSTS

5.76. As explained above, Costa Rica does not have a *right* to use the San Juan River for the purpose of bringing supplies or replacement personnel to her police posts. This purpose is far removed from navigation *con objetos de comercio* or navigation with vessels of the revenue service to protect the right to navigate for the "purposes of commerce." As such, it is not a right emanating from the 1858 Treaty or the Cleveland Award. Since there is no right, Costa Rica's use of the river for this purpose has always been subject to Nicaragua's discretion.

5.77. Costa Rica claims that her security forces have habitually navigated on the river to supply and bring replacement troops to police posts, and that they have done so without obtaining prior authorization from Nicaragua[474]. But the evidence Costa Rica offers does not support this claim. In fact, Costa Rica's documentary evidence on this supposed practice covers only a four-year period, between 1994 and 1998. Costa Rica presents no documentary evidence that the practice existed during the first 136 years after the Treaty of Limits was executed, between 1858 and 1994; and she admits that she stopped navigating on the river for the purpose of supplying her police posts in mid-1998 and never resumed this activity[475].

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[474] See CRR, paras. 3.91-3.95, 4.50, 4.70-4.73.

1. Costa Rica's Evidence Regarding the Supply of Border Posts

5.78. The documentation supplied by Costa Rica concerning her uses of the San Juan River during the period 1994-1998 consists of a single report, dated 18 December 1998, which was prepared by the Commander of the police post at Boca Sarapiquí, Major Hugo Espinoza Rodríguez of the *Guardia Civil*[476]. The 23-page report helpfully presents a year-by-year account of navigation on the San Juan by Costa Rican public vessels. Citing this report, Costa Rica claims that: "A register of Costa Rica's police navigation shows that between August and December 1994 there were 33 return journeys on the River to Barra del Colorado, 107 during 1995, 126 in 1997 and five in June 1998. The register also shows that Costa Rica's police navigated the San Juan in the direction of Boca San Carlos twice in February 1995, 18 times in 1996, 40 times in 1997 and 23 times between January and June 1998"[477]. This is incorrect. The figures mentioned by Costa Rica cannot have been derived from Annex 227, or from any other document attached to Costa Rica's pleadings. The report itself identifies only nine journeys on the river, in total, during 1994, 26 in 1995, 23 in 1996, none in 1997 and two in 1998. But more important than the number of journeys is their purpose. A close reading of this detailed account of the actual uses of the San Juan River by Costa Rican public authorities reveals that there was not a single episode of customs or tax law enforcement, not a single episode of protection of commerce on the river, and not a single report of threats or danger to such commerce. The document shows that Costa Rica simply did not use the river in any manner related to, connected with, or to protect the right of navigation "*con objetos de comercio*." Instead, the principal use of the river by Costa Rican public vessels was for the purpose of supplying and bringing replacements to police posts at various locations on the right bank of the San Juan. By far, the largest number of journeys was for this purpose. Apparently, not all of these journeys were specifically reported. The section covering 1997, which does not describe what voyages were made, says that: "no relevant events were recorded on the San Juan River. Everything went normal during this period, besides for some small operations related to undocumented Nicaraguan immigrants who came into the national territory. The regular border staff relief changes were made normally while navigating the San Juan River"[478].

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[475] *See* CRM, paras. 5.105, 5.109-5.135; *see also* CRR, paras. 4.50-4.52.

[476] *See* First Commandant, Mayor Hugo Espinoza, Sarapiquí Atlantic Command, to General Director of the Border Police, Colonel Max Cayetano Vega, Note 3054-98, P.F.S, 18 December 1998. CRM, Annexes, Vol. VI, Annex 227.

[477] CRM, para. 4.105.

5.79. The report does not state whether Costa Rican authorities obtained, or did not obtain, permission from their Nicaraguan counterparts to navigate on the river prior to undertaking their "regular border staff relief changes." Nor does the report state what conditions Nicaragua imposed. It is completely silent on these subjects. It merely states in several places that "no anomalies were reported, but only activities related to the relief of personnel"[479] (1994), or that "[e]verything went normal and only carrying out the regular staff relief changes were made at the border posts"[480] (1996), or that "regular border staff relief changes were made normally while navigating the San Juan River" (1997)[481]. Costa Rica supplied no documentary evidence to demonstrate what the "normal" practice was, with respect to her use of the river to bring supplies and relief staff to her border posts, during this period.

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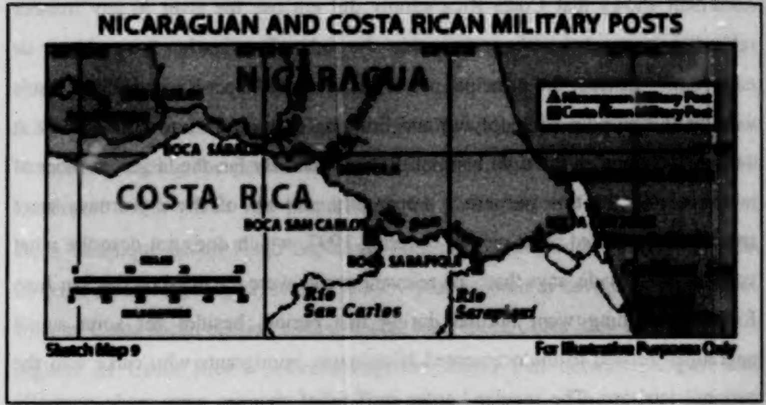
[478] "First Commandant, Mayor Hugo Espinoza, Sarapiquí Atlantic Command, to General Director of Border Police, Colonel Max Cayetano Vega, Note 3054-98, P.F.S., 18 December 1998". CRM, Annexes, Vol. VI, Annex 227, p. 962.


NICARAGUAN AND COSTA RICAN MILITARY POSTS

Sketch Map 9

For Illustration Purposes Only

5.80. The evidence is supplied by the Nicaraguan Army commanders who were directly responsible for security on the San Juan River between 1994 and 1998, and who issued authorizations to Costa Rica's *Guardia Civil* to navigate on the river to conduct their supply and relief operations. According to this evidence, the *Guardia Civil* routinely requested and obtained prior authorization from the

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[479] *Ibid.*

[480] *Ibid.*

[481] *Ibid.*

Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts. As testified by Brigadier General Denis Membreño Rivas, who commanded Nicaragua's Southern Military Detachment from February 1992 to December 1995:

> "During this period, I was requested by a *Guardia Civil* Commander at the border post at Los Chiles, Costa Rica, to authorize the *Guardia Civil* to navigate in their own vessels along the San Juan between their post at Boca de Sarapiquí and their posts at Delta (where the Colorado River begins) and Barra del Colorado to bring supplies and replacement personnel to those posts. The Costa Rican Commander explained that it would facilitate these supply and replacement operations if the *Guardia Civil* could do it by river, because the roads were not very good. I gave my permission for this practice. Prior to each of these operations, which occurred approximately once every month during my tenure at the Detachment, a *Guardia Civil* officer requested authorization to make the journey. I gave the authorization, and communicated it by radio to the Nicaraguan military post at Boca de Sarapiquí. The *Guardia Civil* vessel then reported to that post as it began its journey, and reported to the Nicaraguan post at Delta when it left Nicaraguan waters. At all times while navigating on the San Juan, the Costa Rican officers were prohibited from bearing arms; they were required to carry their arms on the floor of the boat. At some point, I began to require that a Nicaraguan soldier board the vessel at Boca de Sarapiquí and accompany it during its journey through the Nicaraguan river; he disembarked at Delta, when the vessel entered the Colorado River. Similarly, whenever a Nicaraguan Army vessel entered Costa Rican waters, either to attend meetings with *Guardia Civil* officers or as part of a joint operation, we were required by the Costa Ricans to request permission before entering their territory, and to place our arms on the floor of the vessel. We considered this a normal practice in deference to the State that exercises sovereignty over the waters."[482]

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[482] Membreño Affidavit, para 10. NR, Vol. II, Annex 73.

5.81. The Costa Rican report of 18 December 1998 confirms that this practice was mutual. There are several examples mentioned in that report: on 23 September 1994 a Nicaraguan Army vessel at Boca de Sarapiquí "requested permission to enter the Costa Rican territory through inland waterway with the purpose of attending a meeting at the Atlantic Command. Colonel Walter Monge Rodríguez, First Commander of the Unit is notified thereof and he himself authorizes this Unit to enter our territory without arms"[483], on 1 January 1995, a similar request was made and the Costa Rican commander "granted the authorization…and stated that they were authorized to enter that jurisdiction provided that they did not bear any arms"[484], similar requests were made and authorizations given, subject to the requirement that the Nicaraguan Army vessel carry no arms while in Costa Rican waters, on 10 August 1995 and 26 March 1996[485].

2. *Costa Rica's Change in Policy in May-July 1998, and Nicaragua's Response*

5.82. The practice continued under Brigadier General Membreño's successor as Commander of Nicaragua's Southern Military Detachment, Brigadier General Cesar Ovidio Largaespada Pallavicini, who held this position from January 1996 to October 1997. As testified by Brigadier General Largaespada:

> "Relations between the Nicaraguan and Costa Rican security personnel stationed along the San Juan River were

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[483] CRM, Annexes, Vol. VI, Annex 227, p. 944.

[484] *Ibid.*, p. 947.

[485] *See ibid.*, pp. 953, 959.

> generally excellent during the time I served as Chief of the Military Detachment. Periodically, the Nicaraguan post commanders would meet with their Costa Rican counterparts, either at the Nicaraguan or the Costa Rican post, and exchange information on criminal activity.
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> … My headquarters also authorized the Guardia Civil to navigate on the river, in their own vessels, for the purpose of bringing supplies to their posts at Boca San Carlos, Boca de Sarapiquí and Delta. These trips were made on average once every month. The procedure was as follows: the Guardia Civil requested authorization to make a particular trip for the purpose of bringing supplies to particular posts on a particular date; authorization would be given by Nicaragua, and the Guardia Civil vessel would begin its journey by reporting to the Nicaraguan post across the river; a Nicaraguan sergeant would board the vessel and would accompany them on their itinerary on the San Juan River; the Guardia Civil personnel were not permitted to travel armed, so their rifles were placed on the floor of the vessel and the Nicaraguan sergeant made sure that they stayed there while the vessel was in Nicaraguan waters."[486]

5.83. Costa Rica has submitted affidavits from several of her *Guardia Civil* officers who participated in these supply and relief missions on the San Juan River, for the purpose of supporting her claim that the *Guardia Civil* regularly navigated on the river with their arms and without permission from Nicaragua. But even these affidavits corroborate the testimony of Generals Membreño and Largaespada by stating that "from around nineteen ninety-four and thereafter, the Nicaraguan Army asked one of the members of the [*Guardia Civil*] to disembark leaving their arms on the vessel in order to inform or communicate the navigation to the Army authorities. Later…the Nicaraguan Army determined that the vessel coming from Costa Rica had to be accompanied during the navigation…"[487] The *Guardia Civil* officers acknowledge that the Nicaraguan authorities were always notified in advance of any voyage by a Costa Rican public vessel, although they attempt to downplay the significance of this by claiming it was "out of courtesy and as a measure of mutual security"[488] or "for coordination purposes"[489].

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[486] Largaespada Affidavit, paras. 4-5. NR, Vol. II, Annex 72.

5.84. The normal practice of Costa Rican requests and Nicaraguan authorizations continued into 1998, under Brigadier General Largaespada's successor as Commander of the Southern Military Detachment, Brigadier General Francisco Orlando Talavera Siles, who exercised responsibility for security over the San Juan River from October 1997 until June 2000. Between January and May 1998, the normal practice continued without incident. That is, the *Guardia Civil* requested authorization from the Nicaraguan Army prior to each voyage of one of its vessels to supply and relieve staff at its posts along the river, and the Nicaraguan Army granted this authorization, subject to the requirement that the Costa Rican vessel report at the Nicaraguan military posts upon entering and exiting the San Juan, and that the *Guardia Civil* officers navigate unarmed[490]. This state of normalcy is confirmed by the 18 December 1998 report of the *Guardia Civil* commander at Boca Sarapiquí: "From January 98 through May 98, the book of minutes comprehensive of two hundred pages does not record any irregularities or events on the San Juan River during these months"[491].

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[487] Affidavit of First Lieutenant Daniel Soto Montero (Guardia Civil of Costa Rica), 27 January 2006. CRM, Annexes, Vol. IV, Annex 89, p. 480.

[488] Affidavit of Sergeant Carlos Luis Alvarado Sánchez (Guardia Civil of Costa Rica), 27 January 2006. CRM, Annexes, Vol. IV, Annex 88, p. 476.

[489] Affidavit of Daniel Soto Montero. CRM, Annexes, Vol. IV, Annex 89, p. 479.

[490] *See* Talavera Affidavit, para. 3. NR, Vol. II, Annex 78.

5.85. The *Memorial* itself recognizes that prior to July 1998 there were no Nicaraguan violations of Costa Rica's rights "of a systematic or permanent character"[492]. "By contrast in the period after July 1998, Nicaragua adopted a policy involving systematic and permanent violations of Costa Rica's rights, which continue to the present day"[493]. It is important, therefore, to examine the events that occurred in the middle of 1998, which gave rise to Costa Rica's claims in this case.

5.86. We begin with Costa Rica's own contemporaneous account of these events, as described in the 18 December 1998 report from the Costa Rican commander at Boca Sarapiquí[494]. The account starts on 1 June 1998, with the report of a complaint from Colonel (now Brigadier General) Talavera, the Commander of Nicaragua's Southern Military Detachment, about recent incidents in which *Guardia Civil* vessels had detained Nicaraguan citizens navigating on the San Juan, on the suspicion that they were planning to enter Costa Rica illegally: "Colonel Talavera of the [Nicaraguan Army] complained that no one navigating the San Juan River should be detained, since according to Colonel Talavera, some days ago some officers from Delta Zero [a *Guardia Civil* post] had forced some persons to get off the boat. That every time personnel from the

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[491] CRM, Annexes, Vol. VI, Annex 227, p. 962.

[492] CRM, para. 3.01.

[493] *Ibid.*, para. 3.02.

[494] *See* "First Commandant, Mayor Hugo Espinoza to General Director of the Border Police," 18 December 1998. CRM, Annexes, Vol. VI, Annex 227.

Atlantic Command [of the *Guardia Civil*] navigate the San Juan River, they must place the arms on the floor of the vessel."[495]

5.87. The seizure and detention of Nicaraguan citizens navigating on the San Juan by the *Guardia Civil*, about which Colonel Talavera complained, reflected the implementation by the *Guardia Civil* of a new Costa Rican government policy, adopted in May 1998 by the incoming administration of President Miguel Angel Rodríguez. Prior thereto, Costa Rica had not detained or attempted to detain Nicaraguan citizens on the San Juan. Indeed, prior to the coming to power of President Rodríguez, *Guardia Civil* vessels had complied with all the conditions established by the Nicaraguan Army, including the requirement that they navigate unarmed and accompanied by Nicaraguan soldiers. However, on 8 May 1998, the same day that President Rodríguez took his oath of office, his newly-appointed Minister of Public Security, Juan Rafael Lizano, announced that Costa Rica was adopting a much more aggressive policy on the San Juan River to confront immigration from Nicaragua. As reported in the Costa Rican press: "The Minister…revealed that the row began because the former Government had permitted the presence of [Nicaraguan] military escorts on the Costa Rican boats, a situation he prohibited upon assuming the responsibility for the security of the country on 8 May."[496]

5.88. Consistent with the changed policy of the newly-installed Costa Rican government, the *Guardia Civil* ignored the conditions imposed by Nicaragua, which it had previously accepted, and began to send its vessels onto the river armed and unaccompanied by Nicaraguan soldiers, and for the purpose of intercepting and detaining Nicaraguans thought to be bound illegally for Costa Rica. According to the Costa Rican report of 18 December 1998, under the heading "Capture of Undocumented Persons at the Border": "On 14-06-98, at 14:00 hours, Jorge Padilla from Post Delta # 13 at Boca Tapada, Pital, San Carlos reported that he kept four undocumented Nicaraguan citizens and they were transported to the Immigration Office of San Carlos at 16:02 hours"[497].

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[495] *Ibid.*, p. 963.

[496] "Country Firm in Meeting with Nicaraguans", (*La Nación*, 29 July 1998). NR, Vol. II, Annex 19 (Original Spanish: "El Ministro reveló además que el lío nació porque el Gobierno anterior permitió la presencia de custodios militares en las lanchas ticas, situación que él prohibió al asumir la seguridad del país el 8 de mayo.").

5.89. According to the same Costa Rican report, similar incidents occurred on 17 June, 20 June, 23 June and 24 June, with the *Guardia Civil* continuing to implement Costa Rica's aggressive new policy of detaining Nicaraguans on the San Juan River on the simple suspicion that they were attempting to enter Costa Rica illegally; once intercepted on the river, the Nicaraguans were arrested by the *Guardia Civil* and brought to the Costa Rican side for prosecution[498]. In response to these actions, which Nicaragua considered unprecedented and a violation of her sovereignty, Brigadier General Talavera arranged to meet personally with the regional commander of the *Guardia Civil*, Colonel Walter Navarro Romero, at the latter's headquarters in Los Chiles, Costa Rica. The meeting was scheduled for 25 June, but although Brigadier General Talavera arrived at the appointed time and location, his Costa Rican counterpart did not, and no meeting took place[499]. When the two senior officers subsequently met, Brigadier General Talavera protested Costa Rica's actions on the San Juan, and reminded Colonel Navarro that Costa Rica was not authorized to interfere with Nicaraguans navigating on the river, or to carry or use arms while on the river[500]. Colonel Navarro responded: "[I]f the Army of Nicaragua was not going to stop Nicaraguans from using the river to enter Costa Rica illegally, then the *Guardia Civil* would do it"[501]. Colonel Navarro's position was fully consistent with that of the new Costa Rican government in San José. As stated by then Foreign Minister Ricardo Rojas: "Surveillance by Costa Rica is necessary in that zone because there is a lot of illegal immigration, smuggling and other anomalies, *which make it necessary to guard that southern part of the river.*"[502] From Nicaragua's perspective, Costa Rica was asserting, for the first time in 140 years since the Treaty of Limits was signed, a new "right" to navigate on the San Juan River with public vessels for the purpose of law enforcement -- wholly unrelated to navigation "*con objetos de comercio*" -- an attribute of sovereignty vested in Nicaragua, whose dominion and supreme control (*sumo imperio*) over the river had been recognized as "exclusive" in the 1858 Treaty and ever since. The "last straw," as far as Nicaragua was concerned, occurred on 7 July, when two *Guardia Civil* vessels ran down and stopped a Nicaraguan passenger boat as it navigated past the Costa Rican post at La Cureña. When the Costa Rican officers attempted to board the Nicaraguan boat and conduct a search they discovered that the passengers included the Nicaraguan Minister of Tourism, and several army officers[503].

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[497] CRM, Annexes, Vol. VI, Annex 227, p. 963.

[498] *See* "Costa Rican Guards Point Guns at Nicaraguan Boaters", (*La Prensa*, 30 July 1998). NR, Vol. II, Annex 20; *see also* "Nicaraguans Denounce Costa Rican Harassment on National Territory", (*La Prensa*, 2 Aug. 1998). NR, Vol. II, Annex 21.

[499] *See* Talavera Affidavit, para 4. NR, Vol. II, Annex 78.

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[500] *See* Talavera Affidavit, para 4. NR, Vol. II, Annex 78.

[501] *Ibid.*

[502] "Alemán Rejects Arbitration", (*La Prensa*, 25 July 1998). NR, Vol. II, Annex 18 (Emphasis added) (Original Spanish: "La vigilancia por parte de Costa Rica se debe a que por esa vía se presenta mucha inmigración ilegal, contrabandos y otros anomalías, que hacen necesaria la custodia de la parte sur del río.").

[503] *See* Talavera Affidavit, para 4. NR, Vol. II, Annex 77.

5.90. Following these actions by the *Guardia Civil* and statements by senior Costa Rican authorities, Nicaragua decided not to authorize further navigation on the San Juan by the *Guardia Civil*. Nicaragua's decision was communicated to the *Guardia Civil* by Brigadier General Talavera, through his lieutenant, on 14 July 1998[504]. This is reflected in the Costa Rican post commander's report of 18 December 1998: "On 14-06-98 [sic], at 16:10 hours, Sergeant William Herrera from Post Delta # 7, Costa Rica, informed that at the post appeared First Lieutenant Renato Ríos-Cárdenas, Chief of the Post of the Nicaraguan Army at Delta Costa Rica [sic]. He informed that, as instructed by Lieutenant Colonel Orlando Talavera, Commander of the South Detachment of the [Nicaraguan Army], the passage of any Costa Rican authority vessels was restricted as of that date through the San Juan River."[505] Costa Rica acknowledges in her *Memorial* that 14 July 1998 (not 14 June 1998, as erroneously recorded in her Annex 227) was the date on which Brigadier General Talavera's message was delivered[506]. On the same day, Costa Rica retaliated by imposing similar restrictions on Nicaraguan Army vessels seeking entry into Costa Rican waters, according to the contemporaneous Costa Rican report: "at 18:10 hours, Major Hugo Espinoza-Rodríguez informed…that, as of that time and date, entrance of any officer of the [Nicaraguan Army] or of any Nicaraguan police officer into Costa Rican territory was prohibited."[507]

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[504] *See* "Border Row with Nicaraguans", (*La Nación*, 16 Jul. 1998). NR, Vol. II, Annex 17; *see also* Talavera Affidavit, para 5. NR, Vol. II, Annex 78.

[505] "Note of the Intendent [*sic*] Commander in Sservice [*sic*] of Atlantic Command, Sarapiquí, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006". CRM, Annexes, Vol. VI, Annex 240, p. 1049.

[506] *See* CRM, para 5.110.

[507] CRM, Annexes, Vol. VI, Annex 227, p. 964.

5.91. Nicaragua's account of the facts is not materially different from that provided by Costa Rica. Brigadier General Talavera has confirmed that in June 1998 the *Guardia Civil* began to detain Nicaraguan citizens who were navigating on the San Juan and suspected of planning to enter Costa Rica illegally[508]. Upon learning of these unauthorized activities by the *Guardia Civil*, which he considered an affront to Nicaragua's sovereignty, he protested to the Costa Rican authorities, and insisted that they stop detaining Nicaraguans and refrain from carrying or using firearms while on the river. When the *Guardia Civil* disregarded his instructions and continued to arrest Nicaraguans on the San Juan, he advised them that they were no longer authorized to navigate on the river. Costa Rica retaliated by forbidding Nicaraguan Army vessels from entering Costa Rican waters. As Brigadier General Talavera testified:

> "...[U]ntil June 1998 ... vessels of the Costa Rican *Guardia Civil*, without authorization from my headquarters, began to intercept Nicaraguan vessels carrying Nicaraguan passengers in Nicaraguan waters, based on the suspicion that they were planning to enter Costa Rica illegally. The *Guardia Civil* forced the Nicaraguan vessels to land on Costa Rican territory, where all the passengers were immediately arrested. I again protested these unauthorized and unlawful violations of Nicaragua's sovereignty to Colonel Navarro, explaining that Nicaragua could not tolerate the *Guardia Civil* entering Nicaraguan waters to arrest Nicaraguan citizens in their own country, especially without having violated any law, and that they were not found to have an illegal status in our territory. I communicated to him that he and his forces were forbidden from detaining Nicaraguans on the San Juan River, and I reminded him that Costa Rican security personnel were prohibited from transporting, carrying, or using arms on the San Juan river. Colonel Navarro responded that if the Army of Nicaragua was not going to stop Nicaraguans from using the river to enter Costa Rica illegally, then the *Guardia*

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[508] *See* Talavera Affidavit, para. 4. NR, Vol. II, Annex 78.

> *Civil* would do it. As a result of that incident, and Colonel Navarro's refusal to discontinue the *Guardia Civil's* forcible detention of Nicaraguans, I ratified my order prohibiting the *Guardia Civil* from navigating on the river. Costa Rica responded by prohibiting any Nicaraguan army or police officer from entering Costa Rican territory, including Costa Rican rivers, and declaring that if any such person were found on Costa Rican soil or waters he would be detained."[509]

3. Diplomatic Efforts To Restore the Status Quo Ante

5.92. Diplomatic efforts to resolve the dispute quickly ensued. The Chief of Staff of the Nicaraguan Army, General Javier Carrión, was sent by Nicaragua's President to meet with the Costa Rican Minister of Public Security and senior *Guardia Civil* commanders[510]. General Carrión offered to resume authorizing the *Guardia Civil* to navigate on the river to bring supplies and relief staff to its riparian police posts, based on the same conditions that had always applied, namely: that requests for authorization would be made prior to each voyage, that the *Guardia Civil* vessels would stop and report at the Nicaraguan Army posts upon entering and exiting the San Juan, and that they would travel unarmed, with weapons stored on the floor of the vessel[511]. Costa Rica rejected the offer and no agreement was reached[512].

5.93. By this time, public sentiment in Nicaragua was aroused, and pressure was building for the Government to stand firm against Costa Rica's pretensions with respect to the San Juan. Nevertheless, diplomatic activity continued, and on

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[509] *Ibid.*

[510] *See* Carrión Affidavit, para. 10. NR, Vol. II, Annex 68.

[511] *Ibid.*

[512] *Ibid.*

30 July 1998, the Nicaraguan Minister of Defence, Jaime Cuadra, and the Costa Rican Minister of Public Security, Juan Rafael Lizano, issued a joint communiqué announcing that:

> "1. The crew of the vessels of the Public Force of Costa Rica that carry out relief of police and the supply of the border posts located on the right bank of the San Juan River will navigate along the aforementioned river *after having given the required notice* carrying only their normal arms, and *the Nicaraguan authorities may accompany the Costa Rican vessels making this journey* along the San Juan River in their own separate means of transportation. Should the Nicaraguan vessel not accompany the Costa Rican vessels, the latter may carry out their rounds in keeping with the corresponding border post reports as indicated in this agreement.
>
> 2. The Costa Rican authorities must report to the Nicaraguan posts throughout their journey along the San Juan River."[513]

5.94. The Cuadra-Lizano Communiqué, as it came to be called, was never implemented. Had it been, it would have authorized the *Guardia Civil* to resume navigating on the San Juan River for the purpose of bringing supplies and relief staff to Costa Rica's police posts along the river, subject, as before, to prior notification and reporting at all Nicaraguan Army posts en route. In contrast to the prior authorizations issued by Nicaragua, however, this one would have enabled the *Guardia Civil* officers to carry "their normal arms," and would have provided for Nicaraguan Army accompaniment in a separate vessel. Implementation proved impossible because reaction to the communiqué in Nicaragua was hostile. Public opinion was overwhelmingly against it, as were the Nicaraguan President and Congress, who denounced it as a violation of the Nicaraguan Constitution, which forbids the transit of foreign military or security forces through Nicaraguan territory, even for humanitarian purposes, absent an Act of Congress[514]. On 18 August 1998, after due consideration, the Nicaraguan Congress formally rejected the communiqué, leaving it without legal effect[515]. The following day, 19 August 1998, Costa Rica retaliated by announcing that it would prohibit any navigation by the Nicaraguan Army on the Colorado River, which connects the San Juan River to the sea[516].

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[513] Cuadra-Lizano Communiqué, *op. cit.* CRM, Vol. II, Annex 28, p. 195 (emphasis added).

5.95. These mutual prohibitions have remained in effect ever since. As stated in Costa Rica's December 1998 report of activities on the river: "no relevant events were reported during the months of August and September of 1998, except for the fact that passage of Costa Rican authorities through the San Juan River remained prohibited. For this reason, border staff relief changes at the major posts were made by land using police cars"[517]. As of October 1998: "no activity was recorded on the San Juan River, all being normal, conducting the border staff relief by land, in our land vehicles without any special occurrences"[518].

5.96. In July 2000, a high-level delegation from Costa Rica's Ministry of Public Security travelled to Nicaragua to reopen a dialogue on this matter with General Carrión, then the Nicaraguan Army Commander, and his staff. Representing Costa Rica were her new Minister of Public Security, Rogelio Ramos Martínez

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[514] *See* Political Constitution of Nicaragua of 1987, Art. 92 provides: "The passage or stationing of foreign military vessels, airplanes and machinery for humanitarian purposes may be authorized, so long as these are requested by the Government of the Republic and ratified by the National Assembly". NR, Vol. II, Annex 54.

[515] *See* Resolution of the Republic of Nicaragua's National Assembly on the Joint Communiqué Cuadra-Lizano, 30 July 1998. Ordinary Session #5. Managua, 18 August 1998. NCM, Vol. II, Annex 66.

[516] *See* "Costa Rica Retaliates", (*La Prensa*, 15 August 1998). NR, Vol. II, Annex 22.

[517] CRM, Annexes, Vol. VI, Annex 227, p. 964.

[518] *Ibid.*

(who had replaced Juan Rafael Lizano), Colonel Walter Navarro Romero, and Colonel Carlos Alvarado Valverde, International Legal Advisor to the Ministry. According to a contemporaneous Aide-Memoire of the meeting -- a meeting which Costa Rica fails to mention in both her *Memorial* and her *Reply* -- Minister Ramos proposed the reestablishment of the previous conditions, stating that "We understand your situation in prohibiting navigation on the San Juan River, it is an issue that goes beyond your control due to the level reached by the events. I hope that you also understand our situation and our urgent need to supply and relieve border post personnel"[519]. Colonel Alvarado, the Ministry's International Legal Advisor, recalled that under the prior arrangements "the police navigated with their M-16 weapons stored on the bottom of the vessels (this is not armed navigation but rather navigation with arms), with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each [Nicaraguan] post that the boat passed..."[520] General Carrión agreed that Nicaragua had expeditiously issued in "a fraternal spirit" verbal permits and authorizations "for navigation on the river to supply and relieve the personnel assigned to your country's border posts at Sarapiquí and El Delta..."[521] But he also recalled that "[t]he abuse of such permission led us to prohibit navigation over the San Juan River, when you began to patrol the river to intercept illegal immigration and demand rights claimed by Minister Lizano, but which our Highest Authority has stated that you do not have"[522]. General Carrión stated that he was prepared to work with his Costa Rican counterparts to find a solution to their problem, but that this could only be accomplished formally through an Act of Congress, because of constitutional requirements in Nicaragua. "[T]oday," he said, "the only viable way" is for the National Assembly to promulgate a law "that will allow for the permanent supply and relief of your border post forces."[523]

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[519] Aide-Memoire: Meeting between the Commander-in-Chief of the Nicaraguan Army and the Minister of Public Security of Costa Rica, 21 July 2000. Carrión Affidavit, Annex 1 to the Affidavit. NR, Vol. II, Annex 68.

[520] *Ibid.*

[521] *Ibid.*

[522] *Ibid.*

5.97. The law was never enacted. Strained bilateral relations with Costa Rica, principally caused by Costa Rica's aggressive efforts to extend her rights over the river beginning in May 1998, contributed to a political climate in Managua that was not conducive to approval of the necessary legislation. As a consequence, the prohibition on navigation on the San Juan River by the *Guardia Civil* remains in force. Nicaragua maintains that she is entitled to prohibit Costa Rica from using the river to supply and bring relief staff to her riparian border posts, because Nicaragua enjoys exclusive sovereignty over the river, and Costa Rica has no right -- under the 1858 Treaty of Limits or the Cleveland Award -- to navigate on the river for this purpose, which is not related to, connected with, or to protect the right of navigation "*con objetos de comercio.*"

5.98. Even if, *arguendo*, Costa Rica could be said to have a right to navigate on the river for supply and staff relief purposes – a proposition Nicaragua vigorously opposes – the conditions Nicaragua imposed during the period 1994-1998, when she authorized Costa Rica to use the river for such purposes, were a reasonable exercise of Nicaragua's sovereign power over the river. The inconvenience caused to Costa Rica by compliance with these conditions was negligible. Costa Rica herself acknowledges that her rights were not materially violated by the system that was in place prior to July 1998[524]. Even thereafter, when Nicaragua refused to grant the *Guardia Civil* further authorizations to use the river, the inconvenience to Costa Rica has been minimal. New roadways, and even landing strips for aircrafts, make supply and staff relief operations by land practical and convenient. As Costa Rica's own evidence shows, since the prohibition was ordered in 1998, the *Guardia Civil* has continued to bring supplies and relief staff to its posts along the San Juan River by land, as well as by internal Costa Rican watercourses[525]. Roadways, whose construction began prior to 1998, now connect to all of the Costa Rican border and police posts, and facilitate supply and staff relief operations. Sketch Map 10 is an enlargement of the relevant section of a Costa Rican roadmap produced by Ecomapas S.A., a Costa Rican firm. It shows, in brown lines, the roads connected to Costa Rica's three border posts on the San Juan, at Boca San Carlos, Boca Sarapiquí, and Delta. (The complete map has been deposited with the Court.)

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[523] *Ibid.*

[524] *See* CRM, para 5.112.

Sketch Map 10: Roads to Costa Rican Military Posts (road depicted in brown; full map submitted to the Court)

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[525] *See* CRM, Annexes, Vol. VI, Annex 227.

5.99. The litany of ills imagined by Costa Rica as a result of her alleged inability to supply her riparian posts via the San Juan -- increased crime, drug and arms trafficking, and illegal immigration -- have not come to pass. Costa Rica has submitted no evidence of a growth in any of these activities resulting from her reliance on land transport, rather than river transport, to supply her posts on the San Juan River.

4. *The Practice Prior to the 1990s*

5.100. While the evidence is clear and uncontested that Costa Rica has not supplied or brought relief staff to her border posts via the San Juan since July 1998, there is a dispute over when the practice of supplying these posts via the river began. As indicated, Costa Rica's documentary evidence shows that the practice was in effect as of 1994[526]. Nicaragua's evidence, consisting of the testimony of the military commanders of the Southern Military Detachment, dates the beginning of the practice to some point in Brigadier General Membreño's tenure as commander, which began in February 1992. The only other documentary evidence recording the use of the river to supply Costa Rican border or security posts is a report dated 9 March 1892 -- 100 years earlier -- from the captain of the Costa Rican vessel *Adela*, reflecting his request to the Nicaraguan commander at Castillo Viejo for permission to traverse the portion of the San Juan above Castillo Viejo, where both banks belong to Nicaragua, for the purpose of navigating to the Río Frío and into Costa Rica to bring supplies and staff relief to the post at Torrón Colorado[527]. The *Adela* incident has already been addressed at length by Costa Rica[528] and by Nicaragua[529], and it is also addressed in the Appendix of this *Rejoinder*. Its mention here is simply to point out, for the sake of completeness, that it involved Costa Rica's navigation on the river for the purpose of supplying and bringing staff relief to a security post, and that, as described in paragraphs 4.2.19-4.2.22 of the *Counter-Memorial*, the Costa Rican security personnel felt it necessary to hide their weapons while traversing the San Juan. But whatever the interpretation of this event, it would still be a single incident, and there is no documentary evidence, until 1994, of any regular practice in regard to the supply of Costa Rican border or police posts. There is no evidence of any kind, documentary or testimonial, regarding Costa Rica's use of the San Juan to supply or bring staff relief to her security posts between 1892 and the 1960s.

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[526] *See* CRM, Annexes, Vol. VI, Annex 227.

[527] *See* "Report of Ciro A. Navarro, Assistant to the Inspectorate, to the General Inspector of the Treasury, 9 March 1892." CRM, Annexes, Vol. VI, Annex 209.

5.101. With respect to the practice between the 1960s and the early 1990s, Nicaragua has submitted affidavits from Edén Atanasio Pastora, a former revolutionary (and later counterrevolutionary) commander who lived in Costa Rica near the San Juan River in the 1960s and 1970s, and who conducted military operations against successive Nicaraguan governments from that region in the 1970s and 1980s[530], and from Colonel Juan Bosco Centeno Aróstegui, who commanded Nicaraguan government forces along the San Juan River from July to December 1979, and from January 1982 to June 1991[531]. According to Mr. Pastora, during the 1960s and 1970s, the Nicaraguan Government, under the Somoza dictatorship, maintained tense relations with Costa Rica (which it always suspected of extending sympathy and support to its opponents), and did not permit Costa Rican security forces to navigate on the San Juan River. Although the Somoza dictatorship was overthrown in July 1979 as the result of a popular revolution, and the revolutionary government was friendlier to Costa Rica, dissatisfaction with the new government soon led to a counterrevolution, part of which was led by Mr. Pastora from bases in Costa Rica along the San Juan River. The river became a major zone of combat in the conflict that engulfed Nicaragua during the 1980s. As a result of the fighting, transit on the river was extremely dangerous, and Costa Rican security vessels avoided it[532]. Costa Rica's witnesses agree. As testified by Costa Rican police officer Daniel Soto Montero, whose affidavit is annexed to the *Reply*: "due to the armed conflict that existed in Nicaragua at that time, the Costa Rican police did not navigate the San Juan River for security reasons as the river was within the war area"[533]. The war ended in 1990. However, for the first few years thereafter, as testified by Colonel Centeno, Costa Rica's police posts along the right bank of the San Juan "were supplied, and the policemen were periodically relieved, either by river transport from within Costa Rica (via the San Carlos River or the Sarapiquí River) or by road. These police posts were not supplied or relieved by traversing the San Juan River"[534]. Costa Rica's police officers testify otherwise. They state that Costa Rica police vessels began navigating the river in 1990 or 1991, without restrictions imposed by Nicaragua. Nicaragua stands by the testimony of Mr. Pastora and Colonel Centeno, and by the account of events given by Colonel Alvarado, the International Legal Advisor to the Costa Rican Ministry of Public Security, in his meeting with General Carrión, the Nicaraguan Army Commander, in July 2000. As recorded in the contemporaneous Aide-Memoire concerning that meeting, Colonel Alvarado acknowledged, before 1998, the *Guardia Civil* "navigated with their M-16 weapons stored on the bottom of the vessels ... with prior permission from the Nicaraguan Army, which also verified the personnel and contents of the vessel at each post that the boat passed"[535]. However, even if the affidavits submitted by Costa Rica were taken at face value, they would not, in light of the testimonial evidence covering the period prior to 1990, and the documentary and testimonial evidence covering the period from 1994 to the present, supply the basis for a conclusion that Costa Rica had established a right to navigate freely on the San Juan with her police vessels, or that Nicaragua acceded to such a right.

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[528] *See* CRM, paras. 4.85-4.87; CRR para. 1.15.

[529] *See* NCM, paras. 4.2.19-4.2.22.

[530] *See* Pastora Affidavit. NR, Vol. II, Annex 75.

[531] *See* Centeno Affidavit. NR, Vol. II, Annex 69.

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[532] *See* Pastora Affidavit, para. 6. NR, Vol. II, Annex 75.

[533] Affidavit of Daniel Soto Montero, Deed No. 151-1, 27 January 2006. CRM, Annexes, Vol. IV, Annex 89, p. 479.

[534] Centeno Affidavit. para 4. NR, Vol. II, Annex 69.

D. CONDUCTING LAW ENFORCEMENT ACTIVITIES

5.102. Costa Rica claims in these proceedings that she has a right to carry out law enforcement activities on the San Juan River, and to navigate on the river for the purpose of conducting law enforcement activities on the Costa Rican bank of the river. Again, this so-called right is not encompassed within the right to navigate on the river "*con objetos de comercio*", or the right to navigate with revenue service vessels related to, connected with, or to protect the enjoyment of navigation "*con objetos de comercio.*" The evidentiary record, as well as the language of the 1858 Treaty of Limits and the Cleveland Award, belie the existence of such a right. The evidence shows that, on those extremely rare occasions when Costa Rican security personnel carried out law enforcement activities on the San Juan, it was always pursuant to express authorization from Nicaragua.

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[535] Carrión Affidavit, Annex 1 to the Affidavit. NR, Vol. II, Annex 68.

5.103. Costa Rica has submitted only three documents that mention law enforcement activities by her security personnel on the river. The first of these documents is dated 31 October 1892, and is a report from the Chief of the Guard at the Colorado River to the General Inspector of the Treasury. He states that:

> "I would also like to communicate that during a meeting I had with the Customs Manager of Nicaragua aboard the steamer, he gave me the authority to seize all contraband and criminals who put up a resistance along the coasts of Nicaragua. He granted me this power with the authority of his government under the condition that I would allow them to enter Infiernito [in Costa Rican territory] to seize the contraband crossing toward "Castillo" so they could protect themselves; that he would set up a guard in the Colorado bifurcation and in the Nicaraguan coast for mutual protection while pursuing smugglers and criminals, since this was the only way to guarantee protection for honest farmers and settlers who come to take possession of these coasts."[536]

5.104. Quite obviously, the source of the Costa Rican Guard's authority to conduct the contemplated law enforcement activities in Nicaragua's waters was the specific and limited grant conferred by the Nicaraguen Customs Manager on behalf of the government. It should also be noted that the permission granted by Nicaragua was part of a reciprocal agreement, including authorization for Nicaragua to act within Costa Rican territory, for joint law enforcement activities. If the 1858 Treaty or the Cleveland Award had empowered Costa Rican security forces to conduct law enforcement activities on the San Juan River, the grant of authority from the Nicaraguan Customs Manager would have been unnecessary.

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[536] Report of the Chief of the Guard [*resguardo*] of Colorado, Juan Francisco Zeledón, to the General Inspector of the Treasury of 31 October 1892. CRM, Annexes, Vol. VI, Annex 210.

5.105. The second document submitted by Costa Rica relating to her alleged right to conduct law enforcement activities on the river is the "Joint Communiqué Issued by the Army of the Republic of Nicaragua and the Ministry of Public Security of the Republic of Costa Rica" (the so-called Cuadra-Castro Communiqué), dated 8 September 1995[537]. The 103-year gap between the first two documents submitted by Costa Rica on this subject is revealing in itself: Costa Rica has failed to submit any documentary evidence that she carried out law enforcement activities on the San Juan River between 1892 and 1995. Notwithstanding the passage of more than a century, there is a consistency between the two documents. Like the 1892 document, the 1995 Joint Communiqué pertains to joint law enforcement activities on the river by Nicaraguan and Costa Rican security forces, and describes an express grant of law enforcement authority by Nicaragua to Costa Rica. The purposes of the document are stated in its first two operative paragraphs:

> "FIRST: In the interests of strengthening the National Security, sovereignty and independence of our countries, the Nicaraguan Army and the Costa Rican Public Force will coordinate, as of this date, the operational plans that involve our authorities and allow for the necessary development of joint, parallel patrolling at the border of both countries, thereby joining forces in the battle against the illegal trafficking of persons, vehicles, contraband of any nature and joint operations, following the exchange of information and planning carried out by both parties.
>
> SECOND: As of this moment, the chiefs of the border units of both countries will coordinate and cooperate more closely in planning and carrying out joint parallel patrolling along our countries' common border, exchanging operative information of the common entities involved, with respect to all activities affecting the stability of the terrestrial and aerial border zone related to drug trafficking, arms

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[537] *See* "Joint Communiqué Issued by the Army of the Republic of Nicaragua and the Ministry of Public Security of the Republic of Costa Rica, 8 September 1995". CRM, Vol. II, Annex 27.

> trafficking, smuggling, rustling, naval piracy, illegal trafficking of persons and the presence and/or passage of criminal gangs."[538]

5.106. Once again, Costa Rica's ability to conduct law enforcement activities on the San Juan River emanated from an express grant of authority by Nicaragua, as part of an agreement to engage in joint law enforcement. It did not emanate from the 1858 Treaty or the Cleveland Award. The Cuadra-Castro Communiqué formalized the joint law enforcement patrols that were already being conducted by the Nicaraguan Army and the Costa Rican *Guardia Civil*. The existence of the practice is shown in the third and final document submitted by Costa Rica related to law enforcement activities, which is the report of 18 December 1998 prepared by the Costa Rican Guard Commander at Boca de Sarapiquí, which has already been discussed above[539]. The report includes an entry for 14 June 1995 under the heading "Delegation of the Command and the Sandinista Popular Army Patrolling Operation." It describes a "joint patrolling operation in coordination with the Sandinista Army in Cureña area"[540]. A similar note, for 27 June 1995, describes a voyage "to the place known as Banderas in Costa Rica…in coordination with the Sandinista Popular Army with the purpose of patrolling the area, navigating on the San Juan River"[541]. A notation for 29 February 1996, captioned "Cooperation of the Atlantic Command with the Sandinista Army Tracking and Capture," describes the *Guardia Civil*'s response to the Nicaraguan Army's request "to send a patrol unit to the river…in order to cooperate with the [Army] with the capturing of the [Nicaraguan] soldiers [who had deserted their posts] in the area of el Jobo, Delta Coste Rica, located within Costa Rican jurisdiction."[542] Significantly, the 18 December 1998 report, which covers the period between 1994 and 1998, does not identify a single, specific law enforcement activity undertaken on the San Juan River by Costa Rican security forces other than those conducted jointly with the Nicaraguan Army – except for the arrest and detention of suspected illegal immigrants from Nicaragua in June and July 1998, discussed above, which Nicaragua vigorously protested, and which led Nicaragua to terminate the authorization she had previously given to the *Guardia Civil* to navigate on the San Juan River.

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[538] *Ibid.*

[539] *See* CRM, Annexes, Vol. VI, Annex 227.

[540] *Ibid.*, p. 950.

[541] *Ibid.*, p. 951.

5.107. Apart from these documents, the *Memorial* cites two affidavits supplied by *Guardia Civil* officers. These affidavits, as discussed above, refer mainly to Costa Rica's use of the river to supply and bring relief staff to her border posts. They identify no specific law enforcement activities carried out on the San Juan River by Costa Rica alone. The only specific event mentioned involved joint action with the Nicaraguan Army. As testified by *Guardia Civil* officer Daniel Soto Montero: "the Atlantic Command conducted joint operations with the Nicaraguan Army during those years. Such was the case of the kidnapping of a German tourist and a Swiss tourist guide in Boca Tapada de San Carlos, and the kidnapping of a Dutch couple in Altamira. Both events occurred in nineteen ninety-six"[543].

5.108. The conclusion to be drawn is that Costa Rica has no independent right to navigate on the San Juan River for the purpose of conducting law enforcement activities, and that Costa Rica may only navigate on the river to conduct law enforcement activities when she has the express authorization of Nicaragua to do so.

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[542] *Ibid.*, p. 957.

[543] Affidavit of Daniel Soto Montero, 27 January 2006. CRM, Annexes, Vol. VI, Annex 89.

E. PROVIDING SOCIAL SERVICES TO RIPARIAN COMMUNITIES

5.109. Nicaragua does not prohibit Costa Rica from navigating on the San Juan River, with her public vessels, for the purpose of providing medical and other social services to the residents of riparian communities on Costa Rica's side of the river. Nor is it Nicaragua's policy to discourage the delivery of such services via the San Juan River. All that Nicaragua requires is that the vessels using the river for this purpose register their passengers and crew with the Nicaraguan authorities at points of entry and exit on the San Juan River. Passengers and crew must also comply with Nicaraguan immigration requirements, including the possession of a valid passport and, depending on country of origin, a Nicaraguan visa. These are not unreasonable conditions, and in any event, Nicaragua is free to impose them because there is no right afforded to Costa Rica under the 1858 Treaty of Limits or the Cleveland Award to navigate on the San Juan with public vessels for the purpose of providing social services to riparian communities. This has nothing to do with navigating the river "*con objetos de comercio*", or navigating it in a manner related to, connected with, or for protecting navigation for "purposes of commerce."

5.110. As testified by Brigadier General Largaespada, who commanded the Southern Military Detachment between January 1996 and October 1997:

> "On certain occasions, other Costa Rican officials – not belonging to the *Guardia Civil* – requested permission to navigate the San Juan River, among them, officials from the Social Security Agency of Costa Rica and the Ministry of Education. This was also the case for non-governmental organizations, like the Costa Rican Red Cross, which

> brought medicines to the local river communities, or transported the sick. These vessels followed the same procedure as in the case of the *Guardia Civil*: permission to navigate was requested in advance; authorization was given; the vessel reported to the Nicaraguan border posts and registered the passengers and crew; and it was allowed to navigate. As a courtesy, no departure clearance certificates were required and no fees were charged."[544]

5.111. Costa Rica has produced no evidence to contradict Brigadier General Largaespada's description of Nicaragua's reasonable and lawful treatment of Costa Rica's use of the river to deliver public services. In fact, Costa Rica's evidence corroborates Brigadier General Largaespada's account. As attested by Costa Rica's witness Gabriela Mazariegos Zamora, a medical doctor for the Costa Rican National Health System who provided medical services to La Cureña, located on the right bank of the San Juan, which she reached by navigating on the river: "That in her personal experience, she visited La Cureña on four occasions, departing from Boca San Carlos. She states that, at the beginning of each journey, they were forced [translation note: this is Costa Rica's translation of the Spanish word "*obligados*" which, in Nicaragua's view should be translated as the less contentious "obligated" or "required"] to stop at the border with Nicaragua where they had to report to the army of that country, a requirement that they always complied with but for which they were never charged any fees. They had to report themselves again on their way back from La Cureña to Boca San Carlos"[545]. To the same effect are the statements from other Costa Rican witnesses: "She states that doctors and officials from the Costa Rican Social Security Institution have always navigated the San Juan River in order to travel to the towns of Boca Cureña and Chorreras, given that there are no adequate roads to these towns. She points out that the Nicaraguans did not charge for this navigation, although they did have to report to the Nicaraguan post"[546]; "That, according to her duties, she personally made health care visits to the towns of Boca Cureña and Chorreras, travelling there via the San Juan River. She states that the Nicaraguan Army did not charge for this navigation, although they were required to report to that post."[547]

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[544] Largaespada Affidavit, para. 6. NR, Vol. II, Annex 72.

[545] Affidavit of Ana Gabriela Mazariegos Zamora, 14 February 2006. CRM, Annexes, Vol. IV, Annex 98.

5.112. Costa Rica complains that, after she initiated this case, her health care and other social service providers were prevented from navigating on the San Juan, and were unable to continue delivering their services to the Costa Rican communities on the right bank of the river. However, her evidence in support of this claim consists principally of affidavits from various Costa Rican government workers attesting to difficulties they allege to have encountered in securing visas from Nicaraguan consular authorities that would permit them to enter Nicaraguan territory. Although Costa Rica devotes four pages of her *Reply* to a painstaking account of Dr. Thais Ching's efforts to obtain a Nicaraguan visa so that she could navigate on the San Juan, the undisputed fact is: she received one[548]. Costa Rica herself acknowledges that the difficulties experienced by Dr. Ching were not typical: "On other occasions, however, the Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate."[549] Costa Rica asserts that there were no problems in securing authorization for her social service providers to navigate on the San Juan "until May 2006," which was eight months after this case was filed[550]. Dr. Ching's request for a visa was made in June and granted in July of 2006. By May 2007, Costa Rica admits, her government workers were securing Nicaraguan visas more expeditiously. "For example" says the *Reply* "on 22 May 2007 the Coordinator of the Northern Regional Office of the Costa Rican Ombudsman's Office, Ms. Laura Navarro…request[ed] 'authorization' for IMAS [Costa Rica's Joint Institute for Social Assistance] officials who would be participating in a regional Environment and Health Fair that was to be held by the high school of Boca San Carlos, and who intended to take the opportunity to visit poor families in the communities of Boca San Carlos and La Cureña."[551] Nicaragua provided the requested visas on 25 May, that is, within three days[552]. No problems in obtaining Nicaraguan visas to travel on the San Juan at any time thereafter are identified in the *Reply*, which was filed on 15 January 2008.

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[546] Affidavit of Kattia Patricia Corrales Barboza, 16 February 2006. CRM, Annexes, Vol. IV, Annex 99.

[547] Affidavit of Sandra Díaz Alvarado, 16 February 2006. CRM, Annexes, Vol. IV, Annex 100.

[548] *See* NCM, paras. 6.2.14-6.2.15.

[549] CRR, para. 4.36.

Conclusion

5.113. The conclusion is inescapable that Nicaragua has not violated Costa Rica's rights respecting use of the San Juan River by Costa Rican public vessels. Neither the 1858 Treaty of Limits nor the Cleveland Award provides Costa Rica with a right to navigate on the San Juan with her public vessels. Accordingly, she has no such right, since the parties are agreed that Costa Rica enjoys only such rights of navigation as are provided in the Treaty of Limits and the Cleveland Award. While those instruments establish that Costa Rica may have a *duty* to send her public vessels to the defence of the river in case of external attack, when requested by Nicaragua, she has not the *right* to place vessels of her security forces on the river absent such circumstances, and it is undisputed that these circumstances have never presented themselves; in these proceedings Costa Rica does not allege that the river has ever been attacked, or that Nicaragua has prevented her vessels from coming to its defence.

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[550] CRR, para. 4.30.

[551] CRR, para. 4.36.

[552] CRR, para. 4.37.

5.114. The only navigation right that the controlling legal instruments provide to Costa Rican public vessels is the right accorded by Article *Second* of the Cleveland Award to vessels of Costa Rica's revenue service to navigate on the river when such navigation is related to or necessary to protect her right to navigate "*con objetos de comercio*." Even vessels of the revenue service have no general right of navigation on the river. Their right to navigate is expressly limited to circumstances in which their navigation is necessary to the protection of the right under Article VI of the Treaty of Limits to navigate "*con objetos de comercio*." No navigation rights are provided to vessels of the revenue service in any *other* circumstances, and no navigation rights are provided to other public vessels in *any* circumstances.

5.115. The evidence shows that Nicaragua has never violated, abridged or interfered with Costa Rica's right to have vessels of her revenue service use the San Juan River to protect her right to navigate "*con objetos de comercio*." In the first place, Costa Rica has produced no evidence to show that she ever exercised this right, or attempted to exercise it. To the contrary, the evidence shows that Costa Rica has had no need to send her revenue service vessels onto the San Juan, and has not done so, because the kind of commerce that has been carried out on the San Juan after 1858 is merely a local trade in goods, of small volume, and not the kind of international trade that was anticipated when the Treaty was negotiated and executed, which might have required the use of revenue service vessels for its protection. More directly to the point, Costa Rica has introduced no evidence whatsoever to show that Nicaragua prevented her from exercising her right to navigate with vessels of her revenue service at any time, let alone for the purpose of protecting her right to navigate "*con objetos de comercio*." In fact, there is no such evidence because Nicaragua never interfered with the exercise of this right.

5.116. The evidence shows that, in the 150 years since the Treaty of Limits was executed, Costa Rican public vessels have navigated on the San Juan River for only three purposes -- and never to protect the right to navigate "*con objetos de comercio*." These three purposes are: (1) to resupply and bring replacement personnel to Costa Rican border posts accessible by the river (as well as by land); (2) to engage in joint law enforcement operations with Nicaraguan security personnel; and (3) to deliver social services to riparian communities on the right bank of the river. None of these uses of the river has involved vessels of the revenue service, and none has been for the purpose of protecting navigation "*con objetos de comercio*." This is undisputed. The upshot is, none is sanctioned by the Treaty of Limits or the Cleveland Award, and therefore, none of these uses of the river by Costa Rican public vessels is the subject of any navigation right provided by the either of the two legal instruments that both parties regard as controlling in these proceedings.

5.117. The evidence shows that, on each and every occasion when Costa Rican public vessels navigated on the San Juan for one of these three purposes, the navigation was not in the exercise of a right claimed by Costa Rica, but a consequence of the express prior authorization given by Nicaragua in response to Costa Rica's request for Nicaragua's permission to navigate on the river. Nicaragua's granting of this permission in the exercise of her discretion, and the conditions that Nicaragua placed on the permitted navigation, as well as Costa

Rica's acceptance of and compliance with these conditions, provide further proof that, apart from vessels of Costa Rica's revenue service engaged in the protection of navigation "*con objetos de comercio*," no other Costa Rican public vessels enjoy a right to navigate on the river. Accordingly, the conditions that Nicaragua has placed on Costa Rica's use of the river with her public vessels to resupply border posts, or to deliver social services to riparian communities, cannot constitute violations of Costa Rica's "right" to engage in these activities with her public vessels because she has none.

5.118. The evidence shows that there was only one, very brief series of embarkations by Costa Rican public vessels undertaken without express prior authorization by Nicaragua. These occurred in June and July 1998 when Costa Rica abruptly changed her longstanding policy and practice, and sent the *Guardia Civil* and its vessels onto the San Juan to engage in armed interdiction and detention of Nicaraguan boats and passengers thought to be immigrating illegally into Costa Rica. Nicaragua's response was immediate and firm. She instructed the *Guardia Civil* to stop conducting law enforcement activities unilaterally in Nicaragua's sovereign territory, and especially to stop detaining Nicaraguan nationals and their vessels in Nicaraguan waters. When the *Guardia Civil* refused to do so, under instructions from the new government in San José, Nicaragua prohibited all further navigation on the river by *Guardia Civil* vessels. The *Guardia Civil* has not navigated on the river since then. These facts, which are undisputed, further support Nicaragua's conclusion that Costa Rica has no right under the Treaty of Limits or the Cleveland Award to navigate on the San Juan River with her public vessels for law enforcement purposes, absent express prior authorization from Nicaragua.

5.119. Finally, even if, hypothetically speaking, Costa Rican public vessels (other than vessels of her revenue service engaged in protecting navigation "*con objetos de comercio*") were to enjoy a right under the two controlling legal instruments to navigate on the river, the conditions imposed by Nicaragua would not violate Costa Rica's "right" because they constitute reasonable exercises of Nicaragua's sovereign authority to regulate navigation in her waters in defence of her legitimate national interests. Indeed, for more than five years, following the conflict in Nicaragua and after normal navigation in the river was reestablished, and under the governments of two successive Costa Rican Presidents, Costa Rica accepted without objection and fully complied with Nicaragua's requirements that she: request prior authorization from Nicaragua before using the river with vessels of her *Guardia Civil*; stop for registration and inspection at Nicaraguan army posts along the route; deposit the weapons carried by her security personnel on the floor of the vessel while transiting the San Juan; and allow a Nicaraguan soldier to accompany the vessel while in Nicaraguan waters. The reasonableness of these conditions is self-evident, given Nicaragua's interests in protecting her sovereignty against the armed presence in her territory of foreign military or security forces, as well as her interests in environmental protection, law enforcement, navigational safety and border security (described in Chapter IV).

5.120. The reasonableness of Nicaragua's conditions on navigation by *Guardia Civil* vessels was certainly evident to the *Guardia Civil*, which accepted and complied with them until the middle of 1998, when a newly-elected Costa Rican President completely reversed prior policy. And their reasonableness was again apparent to Costa Rica in July 2000, when she expressed to Nicaragua's Army Commander a willingness to return to the pre-1998 conditions.

5.121. For all of these reasons, Costa Rica has failed to demonstrate that Nicaragua has violated her alleged rights of protection, custody and defence of the San Juan River.

CHAPTER VI:

REMEDIES

6.1. In Chapter V of her *Reply*, Costa Rica discusses her claimed remedies in the present case, as well as Nicaragua's request for a Declaration on her rights from the Court. The present chapter answers this part of Costa Rica's argument. However, since the Declaration requested by Nicaragua cannot be separated from Costa Rica's own request for a "[d]eclaration of violations of Nicaragua's obligations"[553], they will be dealt with together in Section I of the chapter, before turning to other Costa Rica's alleged "entitlements" in Section II.

Section I. The "Declarations" Requested by the Parties

6.2. In the list of remedies sought in her *Memorial*, Costa Rica mentions first a "Declaration of violations of Nicaragua's obligations"[554]. This request is formally made and detailed at length in paragraph 2 of Costa Rica's Submissions in both her *Memorial*[555] and her *Reply*[556], even though she does not discuss in the latter Nicaragua's denial of violations[557]. There is no need for Nicaragua to say more about this matter; suffice it to recall that, absent any breach of her obligations by Nicaragua, there can be no question of reparation in general or of a declaration by the Court on these alleged violations in particular[558].

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[553] CRM, para. 6.02-6.03.

[554] *Ibid.*

[555] CRM, p. 147.

[556] CRR, p. 211.

[557] *See* NCM, pp. 239-241, paras. 7.1.2-7.1.4, 4.1.18-4.1.36, 4.1.46, 4.2.36, 6.2.3-6.2.16, 5.1.1-5.1.20, and 5.2.2-5.2.11.

[558] Nor, of course, of "cessation" of those alleged breaches.

6.3. For her part, in her *Counter-Memorial*, Nicaragua has requested the Court to make a formal Declaration in its Judgment on the extent and limits of Costa Rica's right of navigation on the San Juan River[559] in order to put an end to the Applicant's global strategy of expanding her rights under the 1858 Treaty of Limits at Nicaragua's expense. As could be expected, Costa Rica asks the Court to reject that request, in line with her claim for an unlimited right of navigation on the river. However, both requests show that the parties agree at least that such a Declaration would be in accordance with the Court's Statute and function[560].

6.4. Costa Rica describes Nicaragua's request for a Declaration as a "counter-claim" and tries to cast doubt on its admissibility, although without openly challenging it[561]. In fact, Nicaragua has avoided formally advancing her request as a "counter-claim" for two main reasons:

- *First*, she envisages her request not as an autonomous claim but as a pure alternative to the *content* of the declaration requested by Costa Rica herself, i.e., as the consequence of the necessary rejection of the Applicant's submission; and

- *Second*, Nicaragua would be satisfied with such a Declaration being made anywhere in the Judgment, whether in the *dispositif* itself, or in the motives (reasoning). The important issue is that the Court make clear the extent and the limits of Costa Rica's right of navigation "with articles of trade" (*con objetos de*

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[559] NCM, para. 7.2.1-7.2.6.

[560] For formal recognitions of this possibility, see CRM, para. 6.02; NCM, para. 7.2.3; and CRR, para. 5.02.

[561] *Cf.* CRR, p. 204, fn. 585.

comercio) on the San Juan River with the hope to avoid misunderstandings and new crises in the future.

6.5. This being said, even were the Court to consider that this request amounts to a counter-claim, it would be admissible under Article 80 of the Rules (as amended on 1 February 2001). It has been made in the *Counter-Memorial* in paragraph 7.2.6, in which Nicaragua formally requested "the Court to declare that:

> i. Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security.
>
> ii. Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks.
>
> iii. Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858.
>
> iv. Revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty.
>
> v. Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."

6.6. In her Submissions, Nicaragua also requested the Court, "to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7," and this request "comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim" of Costa Rica.

6.7. Costa Rica does not challenge this connection, except in regard to point (v), which, she alleges, "is without merit and without incidence for the present case"[562]. This is not so. First, as described in the *Application* and confirmed in Costa Rica's *Memorial*: "The present proceedings (…) concern breaches by Nicaragua of Costa Rica's rights of navigation and related rights in respect of the San Juan River"[563]. Second, the dredging of the San Juan is in direct connection to navigation on the river, because it is a measure that is required to restore the lower reaches of the river to navigability. Third, the ensuing discussion, by Costa Rica herself, confirms that this request has a direct bearing on the rights she claims. She cites an extract of the Cleveland Award according to which works of improvement may be executed by Nicaragua "provided such works of improvement do not result (…) in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same"[564]. In fact, rather than destroy or impair navigation on the lower San Juan (where Costa Rica enjoys a right of navigation) the dredging of the river would only improve and enhance it.

6.8. The problems posed by the deviation of the waters of the San Juan to the Colorado are long-standing. This variation or change in the water flow occurred very soon after the Treaty of Limits came into force on 15 April 1858. In certain Nicaraguan circles, it has always seemed remarkable that shortly after the Colorado River (a branch of the San Juan) was ceded to Costa Rica in 1858 it started to carry the waters that before flowed out to sea through the Nicaraguan branch that was supposed to be the main branch of the river.

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[562] CRR, para. 5.31.

[563] CRM, para. 1.01.

[564] CRR, para. 5.31, quoting the Cleveland Award. CRM, Vol. II, Annex 16.

6.9. In a note from the Nicaraguan Ministry of Foreign Relations to the Minister of Foreign Relations of Costa Rica dated 13 December 1859, that is, barely a year and a half after the 15 April 1858 Treaty, Nicaragua stated that:

> "The attention of the government of Nicaragua has been forcibly called to the condition of the port of San Juan del Norte, which has been filled up and almost rendered useless on account of the sand which has accumulated in it ever since its waters have abundantly flowed into the channel of the Colorado river; and such a state of things must also demand the attention of Costa Rica, because the interest of the latter in this subject is not less felt, since by existing treaties she has the right of navigation and free import from there."[565]

6.10. Costa Rica herself acknowledged in her Argument to President Cleveland that the Nicaraguan branch of the San Juan suffered a loss of water flow to the Costa Rican branch (the Colorado):

> "The geographical point named in 1858, the mouth of the San Juan river, has not changed its position, although it may be that the volume of waters emptied through it into the ocean is now less than in 1858, and although it may be also that the waters of the Colorado river have increased or found new outlets through the Caño de Animas or any other opening."[566]

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[565] Argument of Costa Rica, *op. cit.*, p. 233. NR, Vol. II, Annex 6.

[566] *Ibid.*

6.11. General Alexander in his first Award of 30 September 1897, in describing the Bay of San Juan pointed out, "The peculiarities of this bay, to be noted, is that the river brings down very little water during the annual dry season. When that happens, *particularly of late years*…a man might cross dry-shod."[567]

6.12. This fact is made more explicit by the Report to the Inspector General of the Costa Rican Treasury of 16 March 1906: "During the summer, all the water from the San Juan River follows the course of the Colorado, left almost completely dry the first…"[568]

6.13. As indicated above, this question is squarely before the Court: it is a matter of greater import to navigation on the river than the simple question of regulation of that navigation that appears to concern Costa Rica; put simply, without sufficient water to navigate, any discussion of navigation rights is entirely academic. Furthermore, Nicaragua's right to make improvements to the river is a matter that was addressed in the Cleveland Award: Costa Rica "*can not prevent* the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result…*in the destruction or serious impairment of the navigation* of the said river or any of its branches at any point were Costa Rica is entitled to navigate the same."[569] These improvements refer to any actions taken by Nicaragua "to keep

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[567] CRM, Vol. II, Annex 18 at p. 531 (emphasis added).

[568] CRM, Vol. VI Annex 214 at p. 878.

[569] *Ibid.*, para. 7 (emphasis added).

the navigation of the river or port free and unembarrassed, or to improve it for the common benefit."[570]

6.14. **And, "The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, *as they both existed on the 15th day of April, 1858*."[571]**

6.15. **Based on the Cleveland Award there is no question that Nicaragua has the right to bring the river and its mouth to the state they were in on the date of the 1858 Treaty. Far from destroying or seriously impairing navigation on the river, Nicaragua's restoration of the water flow that existed in 1858 would only -- to use President Cleveland's words -- "improve it for the common benefit"[572]. Furthermore, Nicaragua does not need Costa Rica's permission to proceed with these works. As President Cleveland decided, Costa Rica "can not prevent the Republic of Nicaragua from executing at her own expense and within her own territory any works of improvement..."[573] Costa Rica has only a right to an indemnification if the damages or impairments mentioned by President Cleveland occur.**

6.16. **Nicaragua is not asking the Court for any indication as to the amount of water that Nicaragua has the right to recover. The request is simply for a Declaration that Nicaragua has this right in general. If dredging works are begun** it will be Costa Rica's task of proving the occurrence of any damages that -- it might be added -- are not offset by the benefits obtained.

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[570] *Ibid.*, para. 4.

[571] Cleveland Award, *op. cit.*, para 1. CRM, Vol. II, Annex 16 (emphasis added).

[572] *Ibid.*

[573] *Ibid.*

6.17. In respect to the four other items included in the Declaration requested by Nicaragua, some remarks must be briefly made:

- Concerning the right of Nicaraguan authorities to issue regulations for navigation (and landing) in the San Juan, in particular related to matters of environmental protection, control and prevention of crime, navigational safety and border protection and security, and the correlative duty of Costa Rica to comply with them, Nicaragua has shown in Chapter IV that her regulations are a necessary consequence and a reasonable exercise of her sovereignty over the bed and the waters of the river[574], the environment and safety of which she has both a right and a duty to protect[575];

- The obligation for Costa Rica to pay "for any special services provided by Nicaragua in the use of the San Juan" by no means "contradict[s] the perpetual right of free navigation"[576]; these are two separate matters: the navigation on the river is free provided it is "with articles of trade" (*con objetos de comercio*) but by no means does it imply that Nicaragua is restrained from charging fees for such services as safety inspections (departure clearance certificates) or immigration processing (tourist cards)[577];

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[574] *See* NR, Chap. II, Sec. I, paras. 2.66-2.81 and especially 2.74.

[575] *See* NR, paras. 4.35-4.68.

[576] CRR, para. 5.28.

[577] *See* above, paras. 4.86-4.91.

- The same reasoning applies to point (iii) – regarding reasonable charges for modern improvements to navigation of the river. Nicaragua does not put into question the Cleveland Award which decided that "[t]he Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary" for the improvement of the river[578]; but this is a different issue. If, for example, Nicaragua, without infringing the rights of Costa Rica to free navigation with articles of trade, would decide to build on her own territory a canal parallel to the river, it is quite clear that the Treaty does not confer on Costa Rica a right of free use of such a canal – even if her navigation were with articles of trade;

- Lastly, Costa Rica asserts that by requesting a Declaration by the Court that "revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty"[579], Nicaragua attempts "to limit Costa Rica's free right of navigation, and its right of navigation with revenue service vessels expressly recognised in the Cleveland Award."[580] As shown above[581], this is not an attempt by Nicaragua to limit a right belonging to Costa Rica; it simply reflects the express words of the Cleveland Award itself:

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[578] Cleveland Award, *op. cit.*, para 4. CRM, Vol. II, Annex 16 (emphasis added).

[579] CRR, para. 5.30 (quoting NCM, para. 7.2.6 (footnote omitted)).

[580] *Ibid.*

[581] *See* paras. 2.129-2.150.

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[582]

6.18. Furthermore, as indicated above in Chapter V, there is no evidence that Costa Rica has ever navigated the San Juan River with revenue service vessels or that she has ever requested permission to do so and been denied or hindered in her exercise by Nicaragua.

6.19. As a consequence, Nicaragua fully persists in her request and formally requests the Court to make the Declaration the text of which is reproduced in paragraph 6.5 above.

Section II. Costa Rica's Further Contentions Regarding Remedies

6.20. As for the rest, Costa Rica's *Reply* focuses on three points:

- "Nicaragua's claim that Costa Rica seeks to exercise diplomatic protection";
- "Assurances and guarantees of non-repetition"; and
- "Compensation".

Nicaragua will briefly answer each of these points in turn.

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[582] Cleveland Award, *op. cit.*, para. *Second*. CRM, Vol. II, Annex 16 (emphasis added).

A. THE ISSUE OF DIPLOMATIC PROTECTION

6.21. In her *Counter-Memorial*, Nicaragua noted that the claims made by Costa Rica "concerning the 'obligation' which would be incumbent upon Nicaragua 'to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes' and, more generally, her claims for compensation for the losses and expenses incurred by Costa Rican citizens, … could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case"[583]. This defect is more particularly apparent in relation to the Costa Rican claims rebutted in Chapter IV of the present *Rejoinder*.

6.22. First and foremost, it must be noted in respect of these claims that the alleged "rights" thus "protected" are not mentioned in the *Application* and are only artificially "related" to the navigation rights which are the only subject-matter of said *Application*. Consequently, the claims are inadmissible and the Court should dismiss them on this ground. Only in the alternative would the question of whether the conditions for the exercise of diplomatic protection are met even arise.

1. Absence of Relation with the Application

6.23. A first remark is in order: in spite of the impression the Applicant tries to give by calling them "Related rights", the claims are not admissible; they are not part of the *Application* which does not mention any of them and clearly limits the case to rights related to navigation (under the 1858 Treaty of Limits).

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[583] NCM, para. 7.1.10.

6.24. **Indeed, in the 2005 *Application*, a list of the "rights of Costa Rica on the San Juan River" has been put forward including:**

> "(a) the perpetual right of free navigation for commercial purposes of Costa Rican boats and their passengers;
>
> (b) the right for boats of Costa Rica to touch at any part of the banks of the river where the navigation is common, without paying any dues except such as may be established by agreement between the two Governments;
>
> (c) the right to navigate the river in accordance with Article Second of the Cleveland Award;
>
> (d) the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the river with their official equipment, including the necessary arms and ammunitions, and for the purposes of protection, as established in the pertinent instruments ;
>
> (e) the right not to have navigation on the river obstructed or impaired at any point where Costa Rica is entitled to navigate."

All said "rights" are clearly rights which, in one way or another, have *prima facie* a direct connection with navigation, as such.

6.25. New "other related rights", which allegedly "arise from the same treaty or from other international binding instruments and which also have consequences relative to the navigation of the San Juan"[584] appeared in the *Memorial*. Costa Rica includes in these new "other related rights" "a customary right to fish on its waters for subsistence purposes for residents living on the Costa Rican bank of the San Juan."[585] Such a formulation clearly shows that there is no connection whatsoever between the allegedly breached obligation and the "freedom of navigation with articles of trade" stemming from 1858 Treaty of Limits. In the *Reply*, there is not even an attempt to relate this "customary right to fish" to navigation.

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[584] CRM, para. 4.118.

[585] CRM, para. 4.118(3).

6.26. In the same way, Costa Rica tries to broaden the scope of the dispute by adding "the right of Costa Rican vessels to carry their own flag"[586] and the "right … of not having to fly the Nicaraguan flag"[587] with the understanding that they constitute rights "'related' to the right of free navigation."[588]

6.27. It might be true, as Costa Rica submits, that "it is up to Costa Rica, and not to Nicaragua, to formulate its claims."[589] However, this is to be done in the *Application*, an essential point that has been ignored by the Applicant in this case. As the Permanent Court put it as early as 1933:

> "it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein."[590]

6.28. This is nevertheless, without any doubt, what Costa Rica does in her overall strategy to widen the object of the dispute far beyond the scope of her *Application*, which was only related to the 1858 Treaty and the rights therein contained. There is no logical or legal connection between the "customary right to fish" and the 1858 Treaty – since it is, as alleged by Costa Rica, a customary right and not a treaty right stemming from this instrument – or to free navigation. And in the same vein, the alleged right to fly the Costa Rican flag has nothing to do with the 1858 Treaty – which does not mention this issue at all – or to free navigation.

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[586] CRM, para. 4.10.

[587] CRR, para. 3.98.

[588] CRR, para. 3.97.

[589] CRR, para. 3.111.

[590] PCIJ, 1933, Series A/B, *Case concerning the Administration of the Prince von Pless* (Preliminary Objection), p. 14.

6.29. Nicaragua does not dispute the right of Costa Rica to amend and to supplement her submissions in the proceedings, even if Costa Rica did not expressly reserve her rights on this possibility in its *Application*. This right is nevertheless not unlimited. As the Court stated recently in the *Territorial and Maritime Dispute between Nicaragua and Honduras* case:

> "[T]he mere fact that a claim is new is not in itself decisive for the issue of admissibility. In order to determine whether a new claim introduced during the course of the proceedings is admissible the Court will need to consider whether, 'although formally a new claim, the claim in question can be considered as included in the original claim in substance' (*Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 265–266, para. 65). For this purpose, to find that the new claim, as a matter of substance, has been included in the original claim, it is not sufficient that there should be links between them of a general nature. Moreover,
>
> '[a]n additional claim must have been implicit in the application (Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36) or must arise 'directly out of the question which is the subject-matter of that Application' (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974, p. 203, para. 72)' (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 266, para. 67)."[591]

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[591] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, ICJ Reports 2008*, para. 110.

6.30. The "customary fishing rights" and the "right to fly the Costa Rican flag" in particular have neither been included in the 2005 *Application*, nor are they implicit in the *Application* which clearly focused only on navigational and (truly) related rights, *i.e.*, rights related to navigation. In addition, they clearly do not arise "directly out of the question which is the subject-matter of that *Application*"[592], *i.e.*, the alleged breach of Costa Rica's right to free navigation. It is indeed not necessary to rule on the alleged existence, or the alleged violation, of any customary right to fish or on any right to fly one flag or another, in order to determine if the right of "free navigation" has been violated.

6.31. Under these circumstances, the issues concerning the "related" rights of fishing and of flying the Costa Rican flag are inadmissible under Article 40 of the Statute and Article 38, paragraph 2, of the Rules of Court.

2. *Non-Exhaustion of Domestic Remedies*

6.32. In her *Reply*, Costa Rica embarks on a lengthy discussion of the relations between treaty claims and diplomatic protection claims, in respect to these so-called "related rights"[593]. Her main argument is that "Costa Rica's rights of navigation are not claimed as a matter of diplomatic protection but as treaty rights belonging to Costa Rica"[594] and that "[i]n any event, even if Costa Rica's claim for compensation for losses caused to Costa Rica for charges, visas and permits required by Nicaragua for Costa Rican vessels and Costa Rican citizens could be characterised as a diplomatic protection claim, that claim is incidental to Costa Rica's claim for her own treaty rights. The dominant claim is Costa Rica's claim for her own navigation rights pursuant to the Treaty of Limits."[595]

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[592] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974*, p. 203, para. 72.

[593] CRR, paras. 5.04-5.09.

[594] *Ibid.*, para. 5.05.

6.33. This precisely is a fundamental difference with the case concerning *Avena and other Mexican Nationals*, which is the exclusive basis for the reasoning of Costa Rica. As made crystal clear by the Court in the passage of its *Judgment* of 31 March 2004 quoted by Costa Rica[596], the basis of the Court's decision in that case is to be found in the very "special circumstances of interdependence of the rights of the State and of individual rights", since Article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations creates rights not only for the Applicant State but also for the national concerned[597]. In the present case, the 1858 Treaty of Limits clearly creates no international right whatsoever for any individual.

6.34. The solution of the *Judgment* in *Avena* cannot, therefore, be transposed in the present case where the alleged rights of the Applicant State and of the individuals concerned are different in nature: they stem from the Treaty for Costa Rica; for the individuals, they can only rise to the surface at the international level after the allegedly injured parties have exhausted national remedies. Far from being inter-connected and interdependent, the respective rights of Costa Rica and her nationals are clearly distinct. One can easily imagine a violation of the 1858 Treaty having no bearing on Costa Rican nationals, whereas this cannot be the case concerning the right of consular notification. A claim for monetary compensation for the injuries suffered by the individuals can consequently not arise until legal remedies are exhausted. As the Court stated in the *Interhandel* case, “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system”[598]. The International Law Commission has stated that “it is only if these [local] remedies fail that the result sought by the international obligation will become definitively unattainable by reason of the act of the State.”[599]

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[595] *Ibid.*, para. 5.07.

[596] *See* CRR, para. 5.08.

[597] *ICJ Reports* 2004, p. 36, para. 40; see also Judgment of 2001, *LaGrand*, *ICJ Reports* 2001, p. 494, para. 77.

6.35. It should also be noted that in the present case, *if* breaches of her obligations could be attributed to Nicaragua (*quod non*), the harm caused would, apparently, have been caused mainly to non-Costa Rican nationals through the charges for “tourist cards” and “immigration fees”[600] or by the requirement of visas[601]. In her *Reply*, Costa Rica goes as far as to allege that “Nicaragua’s unlawful restrictions and hindrances to Costa Rica’s use of the San Juan River have caused considerable harm ... to the inhabitants themselves, many of them Nicaraguan nationals.”[602] Costa Rica certainly can not act on behalf of Nicaraguan or other non-Costa Rican nationals supposedly prejudiced by Nicaragua’s allegedly wrongful acts.

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[598] *Interhandel (Switzerland v. United States of America), Judgment, Preliminary objections, ICJ Reports* 1959, p. 27.

[599] *ILC Yearbook* 1977, Vol. II, 2nd Part, p. 30, para. 2) of the Commentary of Draft Article 22 on State Responsibility.

[600] CRR, para. 4.09.

[601] CRR, para. 4.12.

[602] CRR, paras. 4.03; *see also* 4.26 and 4.33.

B. ASSURANCES AND GUARANTEES OF NON-REPETITION

6.36. In her *Reply*, Costa Rica insists on her request for assurances and guarantees of non-repetition[603]. According to the Applicant such a request would be justified by "Nicaragua's continuing denial of the very existence of Costa Rica's rights. This is precisely", she adds, "the situation in which assurances and guarantees of non-repetition are required…"[604] With all due respect, this is absurd. Following this line of reasoning would mean that assurances and guarantees of non-repetition are due in all cases brought before the Court. By definition, *every* case implies that there exists a dispute between the parties, that is, according to the well-known definition by the Permanent Court, consistently applied by the Court, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[605]; and, a dispute exists when "the claim of one party is positively opposed by the other"[606]. As a matter of definition any dispute before this Court necessarily implies that one of the parties denies, or interprets differently, the rights invoked by the other. Consequently, this would mean that each and every case requires that the Court order assurances and guarantees of non-repetition.

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[603] CRR, para. 5.10-5.15.

[604] CRR, para. 5.12.

[605] PCIJ, Judgment of 30 August 1924, *Mavrommatis Palestine Concessions*, Series A, No. 2, p. 11; see also e.g.: 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, par. 130.

[606] ICJ, Judgment, 21 December 1962, *South West Africa, Preliminary Objections, ICJ Reports* 1962, p. 328; *see also, e.g.*: 3 December 2006, *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, p. 40, par. 90, or 13 December 2007, *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections*, para. 41.

6.37. It is the view of Nicaragua that this is not, and must not be, so. The Court's Judgments are compulsory, and when States consent to the Court's jurisdiction, they accept that the Judgment will be "final and without appeal" in the words of Article 60 of the Statute. If and when, as in the present case, the requested assurances and guarantees would add nothing to the compulsory nature of the Judgment, it is not tenable that "the circumstances (...) require"[607] that such a request be satisfied. It can add nothing to the obligations of the States appearing in Court and accepting its jurisdiction, as in the present case. As Nicaragua has recalled in her *Counter-Memorial*, the Court has frequently declared that "it 'neither can nor should contemplate' the possibility that its Judgments would not be implemented by the Parties"[608]. Costa Rica's request runs against this presumption.

6.38. The jurisprudence invoked by the Applicant must be checked against this fundamental consideration. In light of it, it will be apparent that:

- In *LaGrand* and *Avena*, the *Judgments* limited themselves to take note of the assurances given by the Respondent State[609], which, in fact, added something to the usual consequences of the responsibility of the State as decided in a Judgment;

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[607] *See* Article 30 (b) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.

[608] NCM, para. 7.1.13. *See e.g.*: PCIJ, Judgment, 17 August 1923, *S.S. Wimbledon*, Series A, No. 1, p. 32; 18 September 1928, Series A, No. 17, *Factory at Chorzów (Claims for Indemnity) (Merits)*, Series A, No. 17, pp. 62-63; ICJ, 20 December 1974, *Nuclear Tests, ICJ Reports* 1974, p. 272, para. 60, and p. 477, para. 63, or 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application), ICJ Reports* 1984, p. 437, para. 101.

[609] *See* Judgments of 27 June 2001, *LaGrand, ICJ Reports* 2001, para. 124 and par. 128 (6); and 31 March 2004, *Avena and Other Mexican Nationals, ICJ Reports* 2004, para. 150 and para. 153 (10).

- In the *Genocide* case, the Court did not "direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide"[610]; while the Court recognized that "the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged,"[611] and while the breach was continuing at the time of the Judgment, the Court considered "that the declaration [by which it gave an appropriate satisfaction to the Applicant] is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate"[612]; indeed, the guarantees and assurances required could, in the circumstances, have added nothing to the Court's decision; and

- In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court, without including any decision on that matter in the *dispositif* of its *Judgment*, considered that,

  > "if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to co-operate with them in order to

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[610] Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro), Merits*, para. 466.

[611] *Ibid.*, para. 450.

[612] *Ibid.*, para. 466.

> fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law."[613]

6.39. It goes without saying that what holds true for commitments taken in a treaty is *a fortiori* true for obligations ensuing from a Court's Judgment. In the present case, by no stretch of the imagination can the Court direct the Respondent to give any assurance or guarantee of non-repetition which could go beyond what the Court itself could decide by way of satisfaction or of a declaratory Judgment. The present situation is very similar to that prevailing in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* where the Court stated that it:

> "cannot envisage a situation where either Party, after withdrawing its military and police Forces and administration from the other's territory, would fail to respect the territorial sovereignty of that Party."[614]

6.40. This remark also applies to Costa Rica's request that two Nicaraguan decrees "and all other relevant measures be abrogated"[615]. Not only is this request abusively vague (what are the "other measures" in question?), but also it goes far beyond the "inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[616] Among those limitations, the most fundamental is the one which prompts the Court to refrain from issuing orders to sovereign States[617].

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[613] Judgment of 19 December 2005, *ICJ Reports* 2005, para. 257.

[614] Judgment of 10 October 2002, *Merits*, *ICJ Reports*, para. 318.

[615] CRR, para. 5.15.

C. COMPENSATION

6.41. In paragraph 6.15 of her *Memorial*, Costa Rica makes a series of entirely unsubstantiated claims for compensation, which she simply reiterates in paragraph 5.15 of her *Reply*, also without any attempt to substantiate them. For her part, Nicaragua noted in her *Counter-Memorial* that the Court could not accede to such cavalier claims since the Applicant had only made "very broad assertions as to the [injuries] allegedly endured and [given] no indication whatsoever as to the cause of those damages."[618]

6.42. In the *Reply*, Costa Rica explains that "[i]n fact Costa Rica's Memorial contains detailed specification first of Costa Rica's rights, then of Nicaragua's violations of those rights"[619]. This begs the question – which is not, for the purpose of the present chapter, related to the alleged breaches committed by Nicaragua, but which relates to the losses allegedly suffered by Costa Rica. And, in this respect, it is certainly not enough to simply refer, as the Applicant does[620], to the list given, without any explanation, in one paragraph of the *Reply*.

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[616] ICJ, Judgment, 2 December 1963, *Northern Cameroons, Preliminary Objections, ICJ Reports* 1963, p. 29.

[617] *See e.g.*: PCIJ, 1925, *Mavrommatis Jerusalem Concessions*, Series A, No. 5, p. 50; ICJ, Judgments, 13 June 1951, *Haya de la Torre, ICJ Reports* 1951, p. 79; 27 June 2001, *LaGrand, ICJ Reports* 2001, para. 128 (7); 31 March 2004, *Avena and Other Mexican Nationals, ICJ Reports* 2004, para. 31; 14 February 2002, *Arrest Warrant of 11 April 2000, ICJ Reports* 2002, para. 76.

[618] NCM, para. 7.1.7 (footnote omitted).

[619] CRR, para. 5.17; *see also* para. 5.22 (ii).

6.43. Contrary to what Costa Rica seems to think (or purports to understand), Nicaragua, by no means challenges, as a matter of principle, the possibility of requesting the Court to determine in a later stage of the proceedings the amount of compensation due for damages resulting from internationally wrongful acts when the responsibility of the Respondent has been duly decided in a first Judgment. As was made extremely clear in the *Counter-Memorial*: "the form and amount of compensation can be reserved for a subsequent phase of the proceedings"[621]. But Nicaragua also firmly maintains that "this does not mean that the Claimant in a case before the Court can simply contend that it has endured an injury without establishing the precise and effective nature of said injury and that it has been caused by the alleged internationally wrongful act or acts."[622]

6.44. Curiously, Costa Rica tries to take advantage of the decision of the Court in the *Fisheries Jurisdiction* case[623]. All artificial quibbles aside, the important part of this *Judgment* is one that Costa Rica seems to attribute not to the Court, but to Nicaragua[624]. This sleight of hand is understandable since the Court's position is decisive on the question: "In these circumstances, the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence"[625]. In other words, when the Court, for one reason or another[626], has only "limited information and slender evidence" on the alleged damages, it cannot make a general finding of liability (or responsibility) as Costa Rica is requesting. Moreover, it must be noted that, in the *Fisheries Jurisdiction* case, Germany had offered much more evidence on the damages for which compensation was required than the list in paragraphs 6.15 of the *Counter-Memorial* and 5.16 of the *Reply*, which is repeatedly invoked by Costa Rica as specifying the losses it has allegedly suffered and their relation to Nicaragua's alleged internationally wrongful acts[627].

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[620] *Ibid.*: "Where Costa Rica has requested compensation – to be assessed in a separate phase of these proceedings – it has specified the particular category of loss, whether in the form of charges, expenses and costs directly resulting from Nicaragua's internationally wrongful acts"; the corresponding footnote (557) simply indicates: "CRM, para. 6.15"; *see also* CRR, para. 5.22 (ii) and fn. 577.

[621] NCM, para. 7.1.5.

[622] *Idem.* 7.1.5.

[623] *See* CRR, paras. 5.19 and 5.21-5.22.

[624] *Cf.* CRR, para. 5.21: "But it [NICARAGUA] argues that the Court 'is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited

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information and slender evidence". The corresponding footnote (570) is prudently more honest: "NCM, para. 7.1.7, citing ICJ 1974, p. 204 (para. 76)".

[625] ICJ, Judgment, 25 July 1974, *Fisheries Jurisdiction Case (Germany v. Iceland)*, *ICJ Reports* 1974, para. 76.

[626] In the 1974 case, the main relevant circumstance was the fact that the Applicant state had not submitted a claim for payment of a certain amount of money as compensation and the Court deemed it inappropriate to request further evidence (*ibid.*). In the present case, the Applicant itself refuses to provide the Court with such evidence.

[627] *See* CRM, paras. 5.16-5.17 and 5.22 (ii). The whole text of both paragraphs (which are identical) reads as follows: "compensation should include, *inter alia*:

(a) the loss caused to Costa Rican vessels arising from the so-called 'departure clearance certificate' imposed on Costa Rican vessels navigating the San Juan River;

(b) the loss caused to Costa Rica for the charge of tourism cards, transit permits and immigration fees imposed on Costa Rican vessels navigating the San Juan River ;

(c) the loss caused to Costa Rica for the charge of a consular visa to any Costa Rican citizen seeking to navigate the San Juan River;

(d) the losses caused to Costa Rica for the further expenses incurred by Costa Rican citizens, the consequential losses in their activities, as well as all other material and moral damage suffered by them;

6.45. The position of the Court in the *Fisheries Jurisdiction* case and the conclusions which can be drawn from it are amply confirmed by the case-law which Costa Rica mentions in paragraphs 5.20 and 5.23 of her *Reply* and which deserves closer scrutiny. In chronological order, those decisions are:

- In the case of the *Factory at Chorzów*, the Permanent Court declared that the Polish Government was "under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the [German Companies Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke] as a result of "Poland's unlawful attitude", and the Court accepted to reserve "the fixing of the amount of this compensation for a future judgment"[628]. But before making this decision, the Court carefully ascertained "whether these Companies have in fact suffered damage as a consequence of that attitude"[629]. On the principle of the Polish responsibility, the Court laid down "the guiding principles according to which the amount of compensation due may be determined",[630] and it "discarded for want of evidence, indemnity for [another] damage alleged by the Bayerische" on the following basis:

(e) the expenses and costs incurred by Costa Rica as a result of Nicaragua's violations causing Costa Rica to be unable to resupply the police posts along the Costa Rican bank through the San Juan River;

(f) interest at prevailing rates from the time the claim arose until payment of the judgment; and

(g) such other relief as the Court may deem appropriate".

[628] PCIJ, Judgment, 13 September 1928, *The Factory at Chorzów, Claim for Indemnity, Merits*, Series A, No. 17, pp. 63-64.

[629] *Ibid.*, p. 30; see the ensuing detailed discussion, pp. 30-34.

[630] *Ibid.*, p. 46.

> "The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and the extent of damage resulting from alleged competition of the Chorzów factory with the Bayerische factories; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzów, nor whether the products of that factory are to be found in the markets in which the Bayrische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved."[631]

- In the *Corfu Channel* case, "[t]he Albanian Government [had] not yet stated which items, if any, of the various sums claimed it contests, and the United Kingdom Government [had] not submitted its evidence with regard to them [,t]he Court therefore [considered] that further proceedings on this subject [were] necessary"[632]; and in the *Hostages* case, where "the form and amount of [the] reparation" could not be determined at the date of the initial *Judgment*[633], the existence and consistency of the damage were open to doubt.

- In both the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, and that *Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), it is apparent that at least "a certain amount of

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[631] *Ibid.*, pp. 56-57.

[632] 9 April 1949, *Merits*, *Rec.* 1949, p. 26; see also, Judgment, 15 December 1949, *Corfu Channel, Compensation*, *Rec.* 1949, p. 245.

[633] ICJ, 24 May 1980, Judgment, 1980, *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports* 1980, para. 90.

> evidence" of the alleged injury had been provided during the phase of determination of responsibility."[634]

6.46. Notwithstanding the particular circumstances of each case, it clearly appears that Costa Rica has not complied with her duty to offer an "amount of evidence" of the injury allegedly sustained and of its causal relation with the alleged internationally wrongful acts of Nicaragua, sufficient to allow the Court to appreciate the seriousness of her claim for reparation. *Mutatis mutandis*, the now firmly established *Oil Platforms* jurisprudence can be used as a guideline: "the Court cannot limit itself to noting that one of the Parties maintains that such a dispute [damages] exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 [of 1858] pleaded by Iran [Costa Rica] do or do not fall within the provisions of the Treaty [are the cause of the alleged damages] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain [compensation is due]..."[635]. Similarly, in the present case, it fell to Costa Rica to establish the reality of the damages she complains of and a "sufficiency of subject-matter connection"[636] between the alleged wrongful acts on the one hand and these alleged damages. She has not fulfilled this duty.

6.47. Like the cases concerning the course of boundaries between States; where the Court avoids expressing its views on the respective responsibilities of the parties, in the present case the Court will no doubt avoid mixing the legal issues concerning the régime of the border with that of the alleged responsibility of one or the other party. In the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, the Court declined to "seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result" of the occupation of the Bakassi Peninsula"[637]. Similarly, in the present case, the Declarations requested by the parties as to the régime in question will be sufficient answers to their respective concerns.

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[634] *See* Judgments of 27 June 1984, *Military and Paramilitary Activities in and against Nicaragua, Merits, ICJ Reports* 1986, para. 284; and 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports* 2005, paras. 259-261.

[635] ICJ, Judgment, 12 December 1996, *Oil Platforms, Preliminary Objection, ICJ Reports* 1996, p. 810, para. 17.

[636] Judge Dame Rosalyn Higgins, Separate Opinion, *ibid.*, p. 854.

6.48. These remarks are made, as are all the comments in the present section, for the sole sake of the legal discussion and with the purpose of answering exhaustively all the arguments made by Costa Rica in her *Reply*. The fundamental position of Nicaragua is and remains that Nicaragua has not violated any of the obligations incumbent on her under the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888. To the contrary, it is Costa Rica that has seriously infringed Nicaragua's sovereignty over the San Juan River. And this is why Nicaragua has requested a formal Declaration by the Court.

6.49. Costa Rica is right to note, in the Introduction of her *Reply*, that the reservations included at the end of Nicaragua's *Counter-Memorial*[638] are not (and are not purported to be) counter-claims[639]. Although the rights therein reserved and the breaches of the 1858 Treaty by Costa Rica mentioned in Nicaragua's reservations are not directly the object of the present case, they are clearly part of the general background. With these reservations Nicaragua wishes to make clear that there are more issues concerning the rights of navigation on the San Juan

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[637] Judgment of 10 October 2002, *Merits*, *ICJ Reports*, p. 452, para. 319.

[638] *See* NCM, p. 251.

[639] *See* CRR, para. 1.17.

River and its outlets than are reflected in the claims brought by Costa Rica and are presently before the Court. With this in mind, Nicaragua expressly reaffirms her right to "bring claims against Costa Rica for the ecological damage done to the waters of the San Juan River as well as for the diversion of its traditional water flow into agricultural, industrial and other uses in Costa Rican territory and into the Colorado River."[640]

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[640] NCM, p. 251, para. 3.

SUBMISSIONS

On the basis of the facts and legal considerations set forth in the *Counter-Memorial* and the *Rejoinder*, the Court is requested:

> To adjudge and declare that the requests of Costa Rica in her *Memorial* and *Reply* are rejected in general, and in particular, on the following bases:
>
> **(a)** Either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua.
>
> **(b)** Or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover, the Court is also requested to make a formal Declaration on the issues raised by Nicaragua in Section II of Chapter VII of her *Counter-Memorial* and reiterated in Chapter VI, Section I, of her *Rejoinder*.

CARLOS JOSÉ ARGUELLO GÓMEZ
Agent of the Republic of Nicaragua

15 July 2008

APPENDIX

i. Costa Rica has attached to her *Reply* an Appendix entitled *"Some Historical Issues."* Most of the issues in this Appendix are not relevant to the questions that are before the Court. Those that have any relevance have been dealt with in the text of this *Rejoinder*. Nonetheless, simply to set the record straight Nicaragua attaches this Appendix to her *Rejoinder*.

Section I. The San Juan River

ii. The subjects addressed in this section and the section that follows -- regarding the issue of Nicoya -- are historical rather than juridical in nature, because the Treaty of Limits, the Cleveland Award and the awards of General Alexander have established the boundary between Nicaragua and Costa Rica, rendering the difficult task of interpreting colonial documents or colonial and post-colonial *effectivités* unnecessary.

iii. Regarding the first of these historical issues, Costa Rica states that during the colonial period -- that is, before independence -- the San Juan River did not belong exclusively to either of the provinces.

iv. In order to demonstrate the above, Costa Rica states[641] that Nicaragua claims[642] that the Royal Charter of 1573 establishes that the mouths of the Desaguadero belong to Nicaragua, but that paragraph 5 of this Charter stipulates that the concession granted to Diego de Artieda begins: "on the northern part from the mouths of the Desaguadero." [643] The following phrases of the *Reply* are confusing: first it states that the mouths of the Desaguadero are included in the concession, then that they are not. Subsequently, Costa Rica states that paragraph 12 of the Charter adds "*ques a las partes de Nicaragua,*" and that this addition must be translated as "that is to the parts of Nicaragua" and not as translated by Nicaragua: "that belongs to Nicaragua"[644].

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[641] CR, A 05.

[642] NCM, paras. 1.2.11 and 1.2.3.

v. The more complete text of Paragraph 12 of the Royal Charter stipulates that the territory of Costa Rica would extend "… on the northern part, from the mouths of the Desaguadero, that belongs to Nicaragua (*ques a las partes de Nicaragua*), all across the land, to the Province of Veragua." The correct translation of this is not the literal translation of the old Spanish text. In any case, "*partes de Nicaragua*" does not mean "parts of Nicaragua" but it is another usage of the term "*partido de Nicaragua*" which was the way these territories were identified: *partes* or *partidos*. The phrase "*ques a*" can only truly be translated as that "belongs to". If this difference of opinion were relevant to the case it could be easily resolved by an expert opinion such as the one Nicaragua provides in this *Rejoinder* on the pertinent phrase "*con objetos de comercio*". But in any case, any person who has read *Don Quijote* would have no difficulty understanding that Nicaragua's translation is correct.

vi. Costa Rica adds[645] that in any case, the Royal Charter of 1573 does not establish any change in possession of the entire course of the river or any significant change of the borders, or any modification of the rights of navigation and fishing awarded by the Royal Charter of 1540 and the Order of 1561.

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[643] Royal Charter to Diego Artieda. NCM, Vol. II, Annex 86, p. 302.

[644] CRR, p. 214, fn. 606..

[645] CR, A 09.

vii. Apart from the above, Costa Rica cites[646] a document to which no prior reference has been made: a Royal Charter of 1576, in which authorization is granted to Diego López to conquer and populate the Province of Lataguzgalpa, which includes the land "from the mouth of El Desaguadero to the north up to Cape Camaron." According to Costa Rica[647], this demonstrates that the territory of Nicaragua did not reach the mouths of the Desaguadero. Such importance is assigned to this aspect that a map is attached after page 216 of the *Reply*.

viii. The reality is that Diego López never proceeded with the conquest and population of Lataguzgalpa, because he was unable to find partners who would facilitate the money required to cover the implied costs, as occurred on many other occasions. The result was that Lataguzgalpa did not even begin to exist.

ix. In spite of the above, according to Costa Rica[648] the territory north of the San Juan was left to the Province of Lataguzgalpa and Costa Rica continued with the same limits established by the Royal Charter of 1540 and corrected by the Royal Charter of 1541 and the Order of 1561.

x. Costa Rica maintains[649] that this situation continued in the eighteenth century and that this is confirmed by the report by Luís Díez Navarro to the Captain General of Guatemala in 1744, which states that Costa Rica's jurisdiction is "from the north, from the mouth of the San Juan river until the Shield of Veraguas at the Kingdom of Tierra Firme," and by the Costa Rican Constitution of 1825, which indicates the "mouth of the San Juan River" as the northern border[650]. Clearly, Costa Rica gives an inclusive character to the word "from" in English and "*desde*" in Spanish, which is contrary to common usage.

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[646] CR, A 10.

[647] CR, A 11.

[648] CR, A 12.

[649] CR, A 13.

xi. The paragraphs above attempt to provide a bit of order in a confusing account of colonial records that seeks to make one forget the fact that the Royal Charters only set borders in a conditional manner. That is, limits were set so that the concession holder could exercise conquest and colonization within them. However, if these acts were not carried out, the limits disappeared. This is completely different from the borders set by Royal Orders (*Reales Cédulas*), which marked provinces to be created or that were already established.

xii. With respect to the Royal Charter of 1573, however, upon which Nicaragua supported her right over the San Juan River, it is important to note the opinion of the Costa Rican Academy of History — so important that, although it is cited in footnote 29 on page 20 of the *Counter-Memorial*, it is reproduced here: "...it would not be until 1573, with the Royal Charter granted to Artieda and Chirinos, that a significant change occurred with the respect to the limits. This latter date would also fix the limits that would reign during the entire colonial regime"[651]

xiii. Apart from the documents cited, the geographical reality indisputably points to the fact that the San Juan River could only have been part of Nicaragua in the colonial period. Thus, there are no Costa Rican cities that abut the San Juan and would have needed its waters for navigation. The river was almost exclusively used for commercial traffic between the Nicaraguan cities on Lake Nicaragua, particularly the city of Granada, that handled most of the commercial traffic to and from Spain and the Caribbean. The fort of San Carlos defending the San Juan River is and has always been in undisputed Nicaraguan territory. There was absolutely no reason why the Spanish authorities would even have considered giving the jurisdiction of this waterway to Costa Rica whose main cities had no access to the river.

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[650] CR, A 14.

[651] *Historia del centenario de la entrada de Cavallón a Costa Rica (1561- 1961), 1961. p. 45. See* NCM, para. 1.2.11.

Section II. The Matter of Nicoya

xiv. Nicoya was a territory that, during the colonial era, formed part of Nicaragua. Its limit with Costa Rica was the El Salto River.

xv. Costa Rica states[652] that Nicaragua claims that Nicoya was annexed unilaterally by Costa Rica, exploiting the conflict in which Nicaragua was involved in 1824, and that legally it remained a part of Nicaragua when the border treaty negotiations of 1858 began. According to Costa Rica, these two statements lack any foundation.

xvi. In support of her thesis, Costa Rica alleges[653] that Nicoya participated together with Costa Rica in the election of deputies to Spanish courts in 1813 and 1820; that Nicoya decided to join Costa Rica in a plebiscite in 1824, which was ratified by the Central American Federal Congress in 1825; and that Nicaragua did not include Nicoya as part of her territory in her 1825 Constitution.

xvii. With respect to the above, it is important to observe that Nicoya's participation in the election of deputies was due to the fact that, without said participation, Costa Rica would have been deprived of the right to participate in the courts because she would not have had the required number of inhabitants. In addition, this participation was only for the sake of the elections and did not constitute an annexation.

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[652] CR, A 15.

[653] CR, A 17-18.

xviii. In relation to the plebiscites, it must be noted that the plebiscite itself is an acknowledgment and the clearest proof that this district (*partido*) was part of Nicaragua. All the former colonial possessions of the Spanish Crown, including Costa Rica and Nicaragua, have accepted the principle of *uti possidetis iuris* in the settlement of territorial questions. Whenever this principle has been violated or ignored, there have been serious and lasting consequences. The principle was accepted precisely to avoid situations like that provoked by the Costa Rican annexation of parts of the territory of Nicaragua.

xix. The date of Independence of Nicaragua and Costa Rica is 15 September 1821 and the first plebiscite took place in 1824. This plebiscite was held at a time when Nicaragua was divided and in the midst of a civil war, with opposing governments in León and Granada. In addition, the lack of credibility of plebiscites held in territories under foreign occupation and without impartial oversight is well known. The truth is that a few landowners in Nicoya decided to break away from Nicaragua to have more control over their properties.

xx. Finally, it is true that the Nicaraguan Constitution of 1825 did not include Nicoya on the list of administrative areas. But the same is true of the Costa Rican Constitution of the same year. In fact the Costa Rican Constitution gives a geographic description of her territory and does not divide it abstractly in administrative areas with undefined territory as does Nicaragua's. The Costa Rican Constitution states: "Article 2. The State's territory will extend, for now, from west to east, from the Salto River, which divides it from that of Nicaragua…"[654]. The Salto River was precisely the limit of Costa Rica with

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[654] Fundamental Law of the State of Costa Rica. CRM, Vol. VI, Annex 193.

Nicoya. The Constitution of Nicaragua stipulated in Article II that, "The territory of the State embraces the districts of Nicaragua, Granada, Managua, Masaya, Segovia, Subtiava, and El Realejo." The most that can be said of the Nicaraguan Constitution is that Nicoya is not mentioned by name, as, for example, Matagalpa or Bluefields were not mentioned by name, as for example Matagalpa or Bluefields were also not mentioned by name, but not that it was excluded as the Costa Rican Constitution most certainly excluded Nicoya.

xxi. With respect to the claim that the annexation of Nicoya was ratified by the Federal Congress, what the *Reply* fails to mention is that the Resolution of this Congress was provisional in nature. The annexation was accepted in the wording of the Resolution, "For the time being, and until the demarcation of the territory provided by Art. VII of the Constitution is made…"[655] What was stipulated in Article VII of the Federal Constitution was: "The demarcation of the territory of the States will be made by a Constitutional law with presence of the necessary data." However, the Federation ended in 1838 without having passed this law. Therefore, the annexation remained provisional in nature until the Treaty of 1858 put an end to this question.

xxii. In the *Reply*, one clearly sees the intention to deny that the recognition of Nicaragua's sovereignty over the San Juan River was the *quid pro quo* for recognition of Costa Rica's sovereignty in Nicoya, but rather that the sovereignty over the San Juan was balanced with Costa Rica's right to free navigation[656]. With this argument, the intent is to give a higher value to free navigation, making it appear as the only thing received by Costa Rica, since she already held sovereignty over Nicoya. However, this argument seems to contradict the prior paragraph[657], in which it is stated that the Treaty of Limits was intimately linked with the Costa Rica – Félix Belly Nicaragua Canal Agreement of 1 May, 1858 (two weeks after the treaty). This agreement established that the two countries would be co-sovereigns over the canal and, therefore, have the right to navigation. In this way, confusion is generated between the right to navigation on the river and that of a hypothetical canal.

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[655] Decree of the Federal Congress of Central America, 9 Dec. 1825. CRR Vol. II, Annex 5.

[656] CR, A 21.

xxiii. The details of that agreement are irrelevant since it was not ratified. But apart from this fact the context in which it was signed should not be lost. The treaty came about from the intrigues of a French adventurer who passed himself off as a confidential agent of his government, attempting to exploit the state of mind of a Nicaraguan president whose country had recently been the victim of William Walker's filibusterer invasion and remained fearful of new invasions. The adventurer presented the apparent opportunity to obtain not only the construction of the desired inter-oceanic canal but also the protection of France and other European countries against the threat of new filibusterer invasions. Only months before, Nicaragua had signed the Cass-Irisarri Treaty and, in the United States, there was a refusal to commit to stopping an attack by new invasion forces from that country to Nicaragua.

xxiv. Faced with this situation, the Nicaraguan president enthusiastically accepted the proposals of the French adventurer, and Costa Rica took advantage of this acceptance. However, there were no practical effects, as the French government discovered the abuses carried out in its name, and the treaty was never ratified.

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[657] CR, A 20.

xxv. In the final paragraph of Section B[658], it is stated that Costa Rica has not attempted to conquer and annex any Nicaraguan territory. If this statement had not been made in the *Reply*, it would not have been appropriate to recall that, during the first filibusterer invasion, Costa Rica, with the desire to appropriate the inter-oceanic transit route by force, had occupied military posts along the San Juan River. On 14 October 1857, she sent an ultimatum to the Nicaraguan commander to surrender the fort at San Carlos, situated at the beginning of the San Juan River on Lake Nicaragua. This was considered by Nicaragua to be a declaration of war, as reflected in a decree dated 19 October 1857.[659]

xxvi. This effort by Costa Rica to conquer and annex Nicaraguan territory provoked the reaction of the United States. Thus, Nicaragua cited in her *Counter-Memorial* the note sent by the United States Secretary of State to his Minister in Nicaragua in which he expresses concern that Costa Rica pretends "to appropriate to itself portions of the Territory of Nicaragua."[660]

A. THE COSTA RICAN CONSTITUTIONS OF 1825 AND 1841

xxvii. Costa Rica claimed in her Memorial that the limits set in its Constitution of 1825 were equivalent to those set in the Decree of Bases and Guarantees of 1841[661], whereas in truth the rights based on *uti possidetis iuris* were respected in 1825, and in 1841, this principle was violated.

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[658] CR, A 22.

[659] *See* NCM, para. 1.2.43.

[660] Note from Lewis Case, Secretary of State of the U.S., to William Carey Jones, Special Agent of the U.S. to Central America. NCM, Vol. II, Annex 37.

[661] *See* CRM, para. 2.13.

xxviii. The *Reply*[662] states that Nicaragua attached a Map No. 3 to her *Counter-Memorial* with the intention of showing the border pursuant to the Costa Rican Constitution of 1825. However, Costa Rica maintains[663] that this map shows the start of the line at the mouth of the Colorado River, not at that of the San Juan, and the line ends at the Tempisque River, not at the Salto River. Costa Rica further claims that the Constitution does not establish a straight line between the mouth of the San Juan and the Salto River.

xxix. First of all, it must be pointed out: that the Colorado River is really a mouth of the San Juan River, and it was not until the Cleveland Award in 1888 when it was decided that this was not the border; that the name of El Salto was later changed to Tempisque; and that when the Constitution stipulates the start and end points of the border but does not indicate the line between them, it is logical that said line be a straight line. Map No. 3 is an illustration of the situation as understood contemporaneously. It is taken from a set of maps prepared under the direction of Mr. Ephraim Squier who was appointed Chargé d'affaires of the United States to Central America in 1849 and wrote extensively about the area.

xxx. With respect to the non-inclusion of Nicoya in the Constitution of 1825, Costa Rica states that the Constitution was issued eleven months before the decree of annexation, for which reason it includes the expression "for now." Costa Rica fails to note, however, that this decree was provisional in nature, as indicated above in paragraph xxi. As a result, Nicoya did not belong to Costa Rica until after the 1858 Treaty and should not have been included in the Costa Rican decree of 1841, just as it had not been included in the 1825 Constitution.

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[662] CR, A 23.

[663] CR, A 24.

B. NEGOTIATIONS FOR THE INTER-OCEANIC CANAL

xxxi. Costa Rica states[664] that Nicaragua claims to have acted alone in the canal and transit contracts on the San Juan River, and that Costa Rica's pretension of having participated alone or jointly in canal treaties has no historical or documentary basis[665].

xxxii. With respect to the above, it must be noted that the Award of President Cleveland decided that: "The Treaty of Limits of the 15th day of April, one thousand eight hundred and fifty eight, does not give the Republic of Costa Rica the right to be a party to grants that Nicaragua may make for inter-oceanic canals…"[666] Furthermore, if Costa Rica has no right to be a party, then Nicaragua, as the exclusive holder of this right, may grant to any other country including Costa Rica said right.

xxxiii. This is what occurred with the Montealegre-Jiménez Treaty of 1869, in which Nicaragua granted Costa Rica the right to participate in the Ayón-Chevalier Treaty, which was not ratified. Another treaty cited by Costa Rica[667] is the one signed by the two countries with Félix Belly, referred to in paragraphs xxii-xiv above, and which also was not ratified.

xxxiv. The only navigation contract cited by Costa Rica[668] is one that was signed on 14 June, 1857, a few weeks after the end of the first filibusterer invasion, when Nicaragua had not yet recovered control of the San Juan River transit route.

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[664] CR, A 29.

[665] *See* NCM, paras. 1.3.13 and 1.2.48-49.

[666] Cleveland Award, *op. cit.*, para. 11. CRM, Vol. II, Annex 16.

[667] CR, A 30.

[668] CR, A 32.

Moreover, as explained above, Costa Rica herself had taken over control of the San Juan route and even threatened to take by force the Nicaraguan garrison stationed in the fort of San Carlos on the San Juan River. All of which led to a Declaration of War by Nicaragua against Costa Rican in Decree No. 139 of 19 October 1857.[669] This single contract only with irony could be considered to have established a right of Costa Rica on canal matters

xxxv. Costa Rica also claims[670] that several treaties signed by Nicaragua, including the Cass-Irrisarri Treaty with the United States in 1857, state that these treaties "shall not be construed to affect the claims of the government of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean." The truth is that all of these treaties recognize only the existence of a Costa Rican claim, and not a right. Also, they were prior to the Cleveland Award, which interpreted the clause of the 1858 Treaty regarding Nicaragua's exclusive right to enter into San Juan River canal treaties.

Section III. Costa Rican Navigation on the San Juan River as of 1888

xxxvi. This section of the Appendix of the *Reply* attempts to demonstrate that, after 1888, Costa Rica has continued navigation on revenue service cutters and other public vessels, contrary to what has been affirmed by Nicaragua in her Counter *Memorial*.[671]

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[669] ***See* Decree No. 139, 19 Oct. 1857. NCM, Vol. II, Annex 57, p. 203**

[670] **CR, A 31.**

[671] ***See* NCM, para. 4.2.17.**

xxxvii. The material contained in this section has been addressed in the text of this *Rejoinder* in Chapter V. With one exception, this Appendix will not revisit the cases that have already been dealt with in other sections.

xxxviii. This exception is the incident of the *Adela*, which is also dealt with in Chapter V above. [illegible] The *Adela* incident provides, clear proof that Costa Rica as recently after the 1888 Cleveland Award as 1892 was aware that her boats could not navigate with weapons anywhere on the San Juan River. Furthermore, the incident is a clear confession by Costa Rica of a violation she committed against the treaty and Cleveland Award. In fact, this incident brought up by Costa Rica supports the case of Nicaragua.

xxxix. Costa Rica states (A 35 and CRM 4.85-6) that the *Adela* left the San Carlos River and travelled up the San Juan River with a Commander of the Inspectorate General of Revenue and eight guards, seeking to establish a post at Terrón Colorado on the banks of the Frío River. In the words of the Inspector General himself in the report sent to his superiors he states:

xl. "Before entering the waters under exclusive dominium of Nicaragua, I did hide in Costa Rican territory the arms and ammunitions that I carried for that post, and thus the guards having been disarmed I left them on board of said steamboat while at a place called 'El Ticho' and I went before them to 'Castillo Viejo' with the intention of requesting, as I did, permission from the commander of that fortress to cross the San Juan River with the aforementioned weapons…"[672]

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[672] **Report of Ciro A. Navarro, Assistant to the Inspectorate, to the General Inspector of the Treasury, 9 March 1892. CRM, Vol. VI, Annex 209.**

xli. The results of his request were that "the steamboat carrying the guards was searched, as well as the river's coastlines, and the Castillo was reinforced with at least 25 soldiers."

xlii. Costa Rica states that Nicaragua has presented this incident as a demonstration that Costa Rica does not have the right to navigate the San Juan with weapons[673] but that this is a false interpretation of events[674], and she has provided a map that shows the course of the *Adela*. The map does not clarify the commander's reason for concealing the weapons in Costa Rican territory before going to request permission. It is logical to assume, however, that the reason was so that the Nicaraguan commander at El Castillo would not know that the Costa Rican vessels had navigated with weapons in the part of the river where she has the right to navigate with "*objetos de comercio*". The fact that she was deliberately doing this without the knowledge of Nicaragua does not prove she was doing so based on any rights; it proves the opposite.

xliii. The Inspector left the boat "before entering the waters under exclusive dominium of Nicaragua". Therefore the boat with the weapons was moored on that part of the river where Costa Rica has rights of navigation. Nonetheless, the inspector took the weapons out of the boat and hid them on Costa Rican soil. Why was this necessary if the boat with the weapons was moored in that part of the river were she had rights of navigation?

xliv. After the Nicaraguan head of the garrison found out that the *Adela* was carrying weapons, he immediately went to the place were the boat was moored and searched it. That is, he searched the Costa Rican steamboat while on that part of the river where Costa Rica has rights of navigation. This search was obviously

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[673] *See* NCM, paras. 4.2.2.-4.2.21.

[674] *See* CRR, para. 1.15.

anticipated and that is why the Costa Rican captain had hidden the weapons, which only points to the fact that they knew they were not allowed to navigate with weapons.

xlv. The *Adela* incident only confirms Nicaragua's position that she has always exercised control over the waters of the San Juan River and that Costa Rica has never navigated the river openly with weapons. That she may have done so secretly is another matter; but those surreptitious actions are not proof of rights.

Conclusion

xlvi. The rights of navigation and passage granted to Costa Rica by the Royal Charter of 1541 were not in effect at the time of independence.

xlvii. Nicoya was annexed provisionally to Costa Rica in 1825, and this annexation continued provisionally until the 1858 Treaty of Limits.

xlviii. Recognition of her sovereignty over Nicoya constituted part of the *quid pro quo* that Costa Rica received in acknowledging Nicaragua's sovereignty over the San Juan River.

xlix. The Costa Rican Constitution of 1825 is in accordance with the *uti possidetis iuris* of 1821 and contradicts that of 1841, which includes Nicoya.

l. Costa Rica cannot participate in canal contracts, unless Nicaragua grants her this right.

li. Costa Rica has the right to navigation on the San Juan River only in the limited manner granted under the Jerez-Cañas Treaty and Cleveland Award.

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